## CONTENTS


Index of Authorities ..... i

Caption ..... 1

Opinions Below ..... 1

Jurisdiction ..... 2

Question Presented ..... 2

Treaty Involved ..... 2

Statement of the Case ..... 4

**REASONS FOR GRANTING THE WRIT** ..... 7

*Designation of Errors* ..... 8

*Plaintiffs' Contentions* ..... 9

Article 9(b) Prohibits the Commencement of New Post-Treaty Diversions or Uses Until the Prescribed Finding or Agreement Has Been Made ..... 9

*It was so intended* ..... 11

*The waters were allocated on the basis of existing uses* ..... 12

*Article 9(b) was intended to protect existing uses* ..... 14

*This intent is evident elsewhere in the treaty* ..... 16

Article 9(b) Is Valid ..... 16

*Some method of enforcing the allocation was necessary* ..... 17

*The standard adopted was justified* ..... 19

*Riparian rights to irrigation waters are not property protected by the due process clause of the Fourteenth Amendment* ..... 20

*Water rights in navigable streams are not protected by the Fifth Amendment* ..... 21

*An interstate compact may diminish a water right vested in the state's view* ..... 23

The Senate Resolution Did Not Alter the Meaning of Article 9(b) ..... 23
*The language is not so calculated* ..... 25
*It was not so intended* ..... 26
Plaintiffs May Invoke Article 9(b) as a Rule of Decision ..... 28
*The protection of existing uses which will result from its enforcement was intended* ..... 28
*Plaintiffs might invoke the provision even if it had not been specifically so intended* ..... 30
Conclusion ..... 32
Certificate ..... 32

## APPENDICES

I. Text of treaty and protocol supplementary thereto, both effective November 8, 1945 ..... 1
II. Senate resolution advising ratification of treaty ..... 41
III. Letter of transmittal of treaty from Secretary of State to President ..... 46
IV. Excerpts from the transcript, hearings on treaty, Senate Foreign Relations Committee ..... 51
V. Majority report of Committee, reporting treaty favorably ..... 100
VI. Senate floor debate on ratification of treaty ..... 110
VII. Opinion of Court of Appeals in this case ..... 131

# INDEX OF AUTHORITIES

## CONSTITUTION, TREATIES AND ACTS OF CONGRESS


Constitution of the United States—Article I, Section 10 ..... 19

Treaty Between the United States and Mexico Relating to the Utilization of the Waters of the Lower Rio Grande, etc., Protocol Thereto and Senate Resolution of Advice and Consent Thereto, 56 Stat. 1219 (1945), Treaty Series 994 ..... Appendices I and II

Treaty of Guadalupe-Hidalgo, 9 Stat. 922 (1848), Treaty Series 207 ..... 22

United States Code—

Title 18, Sections 1651, 3058 ..... 20

Title 28, Sections 1251, 1350 ..... 20

Title 18, Section 1254(1) ..... 2

62 Stats. 930 (1948) (28 U.S.C.A., 1331) ..... 6


## CASES


American Insurance Company v. Canter (1828) 1 Pet. (26 U.S.) 511 ..... 31

Antelope, The (1825) 10 Wheat. (23 U.S.) 66 ..... 13

Connecticut v. Massachusetts (1931) 282 U.S. 660 ..... 20

Cooper, In Re (1892) 143 U.S. 472 ..... 28

General Electric Co. v. Robertson (D. Md., 1927) 21 F. 2nd 214 ..... 28

Geofroy v. Riggs (1890) 133 U.S. 258 ..... 29

Gibson v. U. S. (1897) 166 U.S. 269 ..... 22

Haver v. Yaker (1869) 9 Wall. (76 U.S.) 32 ..... 28

Head Money Cases (1884) 112 U.S. 580 ..... 28

Hinderlider v. La Plata, etc. Co. (1938) 304 U.S. 92 ..... 23
Indemnity Insurance Co. v. Pan American Airways
(S. D. N. Y., 1944) 58 F. Supp. 338 ..... 28
McCauley v. Makak Indian Tribes (1942) 128 F. 2d 867 ..... 29
Nereide, The (1815) 9 Cranch (13 U.S.) 388 ..... 20
New Orleans v. de Armas (1835) 9 Pet. (34 U.S.) 224 ..... 29
Paquete Habano, The (1900) 175 U.S. 677 ..... 20
Peggy, The (1802) 1 Cranch (5 U.S.) 103 ..... 29
Society v. New Haven (1823) 8 Wheat. (21 U.S.) 464 ..... 29, 31
Strother v. Lucas (1838) 12 Pet. (37 U.S.) 410 ..... 28, 31
U. S. v. Apalachian Electric Power Co. (1940)
311 U.S. 377 ..... 21
U. S. v. Commodore Park (1945) 324 U.S. 386 ..... 22
U. S. v. 43 Gallons of Whiskey (1876) 93 U.S. 188 ..... 29
U. S. v. Gerlach Live Stock Co. (1950) 339 U.S. 725 ..... 20
U. S. v. Percheman (1833) 8 Pet. (33 U.S.) 51 ..... 11, 29
U. S. v. Rauscher (1886) 119 U.S. 407 ..... 28, 29, 30
U. S. v. Rio Grande Irrigation Co. (1899) 174 U.S. 690 ..... 20, 22
U. S. v. Willow River Power Co. (1945) 324 U.S. 499 ..... 22
United Shoe Machinery Co. v. Duplessis Shoe Machinery
Co. (1st Cir., 1907) 155 Fed. 842 ..... 28, 29
Warren v. U. S. (1949) 179 F. 2d 919 ..... 29

## OFFICIAL NOTES, OPINIONS AND RECORDS

Congressional Record, 79th Congress, 1st Session,
Vol. 91, parts 2 and 3 ..... Appendix VI
Hearings, Senate Foreign Relations Committee, 79th
Congress, 1st Session, On U. S.-Mexico Water
Treaty (in five parts, G.P.O. No. 68368, 1-5) ..... Appendix IV
Letter of Transmittal, Secretary of State to Pres-
ident, U. S.-Mexico Water Treaty and Protocol
(G.P.O. No. 94318-44-1) ..... Appendix III

Report of Majority of Senate Foreign Relations Committee on Treaty (G.P.O. No. 70520) ..... Appendix V
30 Op. Att. Gen. 217 ..... 18

## TEXTS, PERIODICALS AND DICTIONARIES

American Bar Association J., Volumes 30, 31 ..... 27
Hackworth, Digest of International Law ..... 18, 31
Levi, "Law Making Treaties," 28 Minn. L. R. 247 ..... 13
Moore, International Law Digest ..... 13
Ray, Law and Practice Governing the Distribution of Water from International Streams (1933, unpublished treatise, University of Texas Library) ..... 13
Smith, Economic Uses of International Waters (London, 1931) ..... 13
White and Wilson, "The Flow and Underflow of Motl v. Boyd," 9 Southwestern Law J. 1, 377 ..... 9

# SUPREME COURT OF THE UNITED STATES
## October Term, 1955

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**No.**

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HIDALGO COUNTY WATER CNOTROL AND IMPROVEMENT DISTRICT NO. 7, et al

*Petitioners,*

*versus*

WYATT C. HEDRICK, et al

*Respondents*

---

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now come the Petitioners, Hidalgo County Water Control and Improvement District No. 7, Willacy County Water Control and Improvement District No. 1, Luther Wyrick and Marius Madsen, and pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above indicated case on September 30, 1955.

### OPINIONS BELOW

The memorandum opinion of the District Court (R. 43-55) is unreported. The opinion of the Court of Appeals (R. 98-113, Appendix VII, App. p. 131) is reported at 226 F. 2d 1.

## JURISDICTION

The judgment of the Court of Appeals was rendered on September 30, 1955 (R. 114). Petitioners' petition for rehearing was denied on November 1, 1955 (R. 119). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

## QUESTION PRESENTED

Petitioners were lawfully diverting and using in Texas waters of the Rio Grande below Fort Quitman prior to November 8, 1945, the effective date of the treaty between the United States and Mexico relating to the utilization of its waters. These petitioners invoke the provisions of paragraph (b) of Article 9 of that treaty against the respondents who, without first obtaining the finding, and absent the arrangement, there prescribed as a prerequisite to the commencement of new diversions or uses after the treaty's effective date, first began after that date to divert and use those waters in the United States, to the injury of petitioners. The question presented is:

Is the provision contained in the second sentence of Article 9(b) of the subject treaty a law of the United States which may be invoked against persons violating it by making diversions and uses in the United States there prohibited, at the suit of other persons who were lawfully diverting and using waters of the Rio Grande in the United States below Fort Quitman on the treaty's effective date and who are being injured by such violation?

## TREATY INVOLVED

Paragraphs (a) and (b) of Article 9 of the Treaty between the United States and Mexico Relating to the Utilization of the Waters of the Colorado and Tijuana Rivers and of the Rio Grande from Fort Quitman, Texas, to the Gulf of Mexico, signed at Wash-

ington February 3, 1944, and effective November 8, 1945, 56 Stat. 1219 (1945); Treaty Series 994, read as follows:

> "(a) The channel of the Rio Grande (Rio Bravo) may be used by either of the two countries to convey water belonging to it.
>
> "(b) Either of the two countries may, at any point on the main channel of the river from Fort Quitman, Texas, to the Gulf of Mexico, divert and use the water belonging to it and may for this purpose construct any necessary works. However, no such diversion or use, not existing on the date this Treaty enters into force, shall be permitted in either country, nor shall works be constructed for such purpose, until the Section of the Commission in whose country the diversion or use is proposed has made a finding that the water necessary for such diversion or use is available from the share of that country, unless the Commission has agreed to a greater diversion or use as provided by paragraph (d) of this Article. The proposed use and the plans for the diversion works to be constructed in connection therewith shall be previously made known to the Commission for its information."

Paragraph (d) of said Article 9 reads as follows:

> "(d) The Commission shall have the power to authorize either country to divert and use water not belonging entirely to such country, when the water belonging to the other country can be replaced at some other point on the river."

The resolution of the United States Senate advising and consenting to the ratification of the treaty and paragraph (c) of the understandings included therein read as follows:

> "RESOLVED (TWO-THIRDS OF THE SENATORS PRESENT CONCURRING THEREIN), That the Senate advise and consent to the ratification of Executive A, Seventy-eighth Congress, second session, a treaty between the United States of America and the United Mexican States, signed at

Washington on February 3, 1944, relating to the utilization of the waters of the Colorado and Tijuana Rivers and of the Rio Grande from Fort Quitman, Texas, to the Gulf of Mexico, and Executive H, Seventy-eighth Congress, second session, a protocol, signed at Washington on November 14, 1944, supplementary to the treaty, subject to the following understandings, and that these understandings will be mentioned in the ratification of this treaty as conveying the true meaning of the treaty, and will in effect form a part of the treaty:

. . . . . .

"(c) That nothing contained in the treaty or protocol shall be construed as authorizing the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, or the United States Section of said Commission, directly or indirectly to alter or control the distribution of water to users within the territorial limits of any of the individual States."

The full text of the treaty is set out as Appendix I to this brief (Appendices pp. 1 *et seq.*), and the full text of the Senate resolution is set out as Appendix II (Appendices pp. 41 *et seq.*).

## STATEMENT OF THE CASE

Parties will hereafter be designated as in the trial court, where the petitioners were plaintiffs and the respondents were defendants.

The plaintiffs are two Texas citizens and two water control and improvement districts, political subdivisions of the State of Texas created to irrigate the lands within their boundaries. These four plaintiffs instituted this suit in the United States District Court for the Southern District of Texas against the several defendants who are individual and corporate owners of lands in Texas near the Rio Grande (R. 7-8, 15).

The complaint states the following facts:

The plaintiff districts had lawfully diverted waters of the Rio Grande for the irrigation of lands within their boundaries from long prior to November 8, 1945, until the time this suit was instituted, and the individual plaintiffs had lawfully used the waters of the Rio Grande to irrigate their lands on and for years prior to November 8, 1945, and until this suit was instituted (R. 13).

At the time of the institution of the suit, the United States Section of the International Boundary and Water Commission had made no finding of availability of waters of the United States' share, as prescribed in paragraph (b) of Article 9 of the treaty, and no agreement such as is described in paragraph (d) of Article 9 of the treaty had been made by the Commission (R. 14).

The several defendants, who are the owners of or tenants on lands upstream of the plaintiffs' lands first began at various times after November 8, 1945, to divert waters of the Rio Grande below Fort Quitman to irrigate their lands which had not theretofore been irrigated (R. 15-19). There was insufficient water within the United States' share of the Rio Grande's waters to satisfy uses existing prior to November 8, 1945, and the defendants' unauthorized diversions have greatly decreased the quantity of water available to the plaintiffs, so that there has been insufficient water within the United States' share to meet the plaintiffs' reasonable demands. Plaintiffs are being damaged by the defendants' diversions, and they have no adequate remedy at law (R. 14, 19-20).

The plaintiffs pray that the defendants be permanently enjoined from diverting or using waters of the Rio Grande below Fort Quitman until such time as there has been such a finding or agreement as is prescribed in paragraph (b) of Article 9 of the treaty. Plaintiffs also allege that a controversy exists between the parties with respect to whether the treaty provision invoked

is domestic law prohibiting new diversions of water of the Rio Grande absent the prescribed finding or agreement and pray for declaratory judgment that said provision does have that effect (R. 20-22).

Jurisdiction of the district court is claimed under Acts June 25, 1948, Ch. 646, 62 Stats. 930 (28 U.S.C.A. Sec. 1331) because the plaintiffs' cause arises under the treaty provision which plaintiffs invoke, and the amount in controversy, exclusive of interest and costs, is in excess of $3,000.00 (R. 9).

The defendants moved that the suit be dismissed (1) for want of jurisdiction and (2) for failure to state a cause of action upon which relief could be granted. These motions state, in substance, that the defendants are riparian owners having, in the states' view, vested rights to divert waters of the Rio Grande not subject to being impaired by treaty, that the treaty was not intended to inhibit the exercise of those rights, and that the Senates' resolution of advice and consent to the ratification of the treaty nullified that effect of the treaty, if it was so intended (R. 22-43).

The district court sustained both motions and dismissed the cause (R. 56). Its memorandum opinion (R. 43) is unreported.

The Court of Appeals for the Fifth Circuit affirmed the order of dismissal, holding that although federal jurisdiction did attach, the complaint stated no cause of action (R. 98, App. pp. 131-144).

We wish particularly to point out this inaccuracy in the Court of Appeals' opinion: "Since the plaintiffs insist that their asserted priority of right to divert and use waters of the Rio Grande arises from the treaty, it necessarily follows that under the plaintiffs' theory the rights of the Defendants would be paramount in the absence of the treaty" (R. 107, App. pp. 138-139). Of course, this does not at all follow. By this suit we invoke only the rule of

Article 9(b). The complaint does not state the nature of the plaintiffs' rights to divert and use waters of the Rio Grande or of the defendants' claimed rights. We simply contend that, absent the finding or agreement prescribed in Article 9(b), new post-treaty diversions and uses are prohibited, and that this provision is a law of the United States which plaintiffs properly invoke as a rule of court. By their motions to dismiss, the defendants allege that they are riparian proprietors and that the plaintiffs are appropriators (R. 29). This does not appear from the complaint, but the Court of Appeals found it to be true (R. 105, App. p. 137). We do not consider the error of the Court of Appeals in thus judging the sufficiency of the complaint by allegations of the motion to be sufficiently important to command the attention of this Court, but we point it out to clarify our position.

## REASONS FOR GRANTING WRIT

This is the first case that has arisen under the 1945 U.S.-Mexico water treaty.

The question involved is an important one of federal law that has not been settled, and should be settled, by this Court. It is of vital importance to the economy of a highly developed and populous area of the Lower Rio Grande basin in Texas which has been built upon, and largely rests upon, long established beneficial uses of water of the Rio Grande. These uses consist principally of the irrigation of some 500,000 acres of land in the Counties of Hidalgo, Cameron and Willacy, Texas, and the domestic, municipal and industrial uses by a population of some 250,000 in that area. The decision of the question presented also affects the ability of the U. S. to honor its treaty commitment.

Further, this is the first case in which this court has been called upon to decide whether a treaty between the U. S. and a neighboring nation may, in addition to dividing the waters of an

international stream between the two countries, impose conditions and limitations upon the exercise of claimed rights to the use of the water of the stream by intending water users within the countries.

*Designation of Errors*

As we understand the opinion of the Court of Appeals, it holds that Article 9(b) means simply that the laws of Texas shall govern in all questions with respect to whether a given diversion of the waters of the Rio Grande is permissible and that Article 9(b) prescribed no rule which may be invoked by Plaintiffs (R. 110, App. p. 141) because:

1. "Countries" as used in Article 9(b) means "nations" (R. 109-110, App. p. 141), and in this nation the states make the laws of real property. (R. 110-111, App. pp. 141-142). These include the laws regulating the use of waters of international streams, because the courts of Texas classify riparian rights as incorporeal hereditaments (R. 107, App. p. 139).

2. Article 9(b) would be invalid if taken as diminishing defendants' riparian rights; hence such a construction is to be avoided (R. 107-109, App. pp. 139-140).

3. Paragraph (c) of the Senate's resolution makes it clear that no such construction was intended (R. 112, App. p. 143).

On the basis of these conclusions, the court affirmed the order of the district court dismissing the suit for failure to state a cause of action.

We have no quarrel with the general proposition that states make the law governing real property within their limits. But the holdings and the other supporting conclusions were erroneous, as

was the affirmance of the order of dismissal.

*Plaintiffs Contentions*

Plaintiffs contend that:

(1) The second sentence of Article 9(b) prohibits the commencement after the treaty's effective date of diversions and uses of waters of the Lower Rio Grande, regardless of who may make them, unless the prescribed finding or agreement has been made;

(2) This provision is valid;

(3) Its meaning was not altered by the Senate resolution, and

(4) This provision is a law of the United States which the Plaintiffs, being injured by its violation, may invoke as rule of decision in the courts of the United States.

Plaintiffs do not contend that Article 9(b) creates any "priority." It simply provides the single inhibition on new diversions and uses, and Plaintiffs rely on that provision alone.[1]

## ARTICLE 9(b) PROHIBITS THE COMMENCEMENT OF NEW, POST-TREATY DATE DIVERSIONS AND USES UNTIL THE PRESCRIBED FINDING OR AGREEMENT HAS BEEN MADE

Article 9(b) reads:

"Either of the two countries may, at any point on the

[1] No doctrine of Texas water law is urged by plaintiffs, but both courts below have adverted to the chaos in Texas water law circles (R. 53, 107; Appendix VII, App. p. 139). For an explanation of some reasons for the confusion, see White and Wilson, "The Flow and Underflow of Motl v. Boyd," 9 Southwestern Law Journal 1, 377. The complaint in this case asserts, as does our petition here, that the issue is the effect and validity of the treaty provision invoked.

main channel of the river from Fort Quitman, Texas, to the Gulf of Mexico, divert and use the water belonging to it and may for this purpose construct any necessary works. However, no such diversion or use, not existing on the date this Treaty enters into force, shall be permitted in either country, nor shall works be constructed for such purpose, until the Section of the Commission in whose country the diversion or use is proposed has made a finding that the water necessary for such diversion or use is available from the share of that country, unless the Commission has agreed to a greater diversion or use as provided by paragraph (d) of this Article. The proposed use and the plans for the diversion works to be constructed in connection therewith shall be previously made known to the Commission for its information."

This provision prohibits, by its second sentence, the commencement after the treaty's effective date (Nov. 8, 1945) of new diversions and uses of the waters of the Rio Grande below Fort Quitman, until the prescribed finding or agreement has been made. No argument can make that clearer.[2]

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[2] The opinion of the court of appeals (R. 109-110, Appendix VII, App. p. 141) could be taken to mean that only governmental diversions are inhibited by Article 9(b), since "no *such* diversions or uses" in the second sentence refers back to the diversions and uses by "countries" mentioned in the first sentence, and since the court of appeals equates "countries" with "the two nations, the United States and Mexico" (meaning federal governments?). While we no not think this was what the court below meant, the treaty's uses of "Governments" and "countries" refutes the idea. Where a governmental obligation is undertaken, the treaty uses the word "Government." "Country" is used to include the land and people governed. Thus the *Governments* undertake to:

- settle disputes to which the observance and execution of the treaty give rise (Art. 2, second paragraph)
- bear expenses (Art. 2, seventh paragraph)
- make agreements (Art. 3, last paragraph)
- construct works (Art. 5, first paragraph)
- approve the damsites, plans for dam construction, construction dates, and bear construction and maintenance costs (Art. 5)
- receive reports from the Commission (Arts. 6 and 7)
- construct works (Arts. 6 and 7)
- operate and pay for the construction and maintenance of hydroelectric plants (Art. 7)
- construct works (Art. 12, first sentence)

*(Continued on Page 11)*

## Article 9(b) Was Deliberately Intended So To Inhibit New Diversions

Article 9(b) is clear and can be construed not to prohibit new diversions absent the prescribed finding or agreement only by a construction that does violence to its language. But if the intent of the treaty makers were important, the same result would follow.

Mr. Frank Clayton, General Counsel for the United States Section of the International Boundary Commission which represented the United States in the treaty negotiations, testified before the Senate Foreign Relations Committee, after quoting Article 9(b) at length:

> "The effect of this provision is that all existing diversions from the river and uses from the river in both countries are protected under the treaty. If somebody wants to divert

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The *countries*, on the other hand:
- have works located within their limits (Art. 2, fifth paragraph)
- have waters allocated to them (Art. 4, first sentence)
- own the water (Art. 8, sub-paragraphs (b), (c) and (f)
- use the Rio Grande to convey water (Art. 9(a))
- make consumptive uses of water (Art. 9(c))
- divert and use water (Art. 9(d) and (c))
- experience droughts (Art. 9(f))
- have the right to divert (Art. 9(g))

and so on. A clear illustration is:

"The two *Governments* recognize that both *countries* have a common interest in the conservation and storage of waters . . . " (Art. 8, first sentence, emphasis added). A reading of the entire treaty shows that the distinction was scrupulously observed.

Further, the Mexican counterpart of the second sentence of Article 9(b) reads:

"Sin embargo, no podrá hacerse ninguna derivacion o uso en cualquiera de los dos países, fuera de los existentes en la fecha en que entre en vigor este Tratado, ni construirse ningunas obras con aquel fin, hasta . . . "

This translates,

"However, no diversion or use may be made in either of the two countries, outside of the ones existing on the date this treaty enters into force, until . . . "

No word corresponding to the "such" in the English counterpart is used in the Mexican counterpart. Hence "no *such* diversion or use" was thought by the treaty makers to mean "no diversion or use." Both counterparts are the law of the land and, in case of doubt, both should be looked to for the intended meaning. U. S. v. Percheman (1833) 8 Pet. (33 U.S.) 51, per Marshall, C.J.

some more water from the stream—and we will assume that it is in the United States—the only thing the American section is called upon to do is to determine whether there is impounded in the reservoirs along the Rio Grande, or flowing in the river, enough water to satisfy that use within the share of the United States, a matter of mathematical determination that, under the treaty, has got to be kept up from day to day, week to week, and month to month. But where that diversion is to be and where the use is to be is solely a matter for State authorities under State law." [3]

The provision was said to mean the same thing by the memorandum filed by the Department of State with the Senate Foreign Relations Committee,[4] by the majority report of that committee[5] and by the witnesses who had anything to say on the subject.[6] Nobody connected with the negotiation or ratification of the treaty ever suggested it had any other, or less, meaning.

This provision, which leaves existing diversions and uses unfettered while restricting the commencement of new diversions and uses, had a dual purpose: The restriction of the countries' diversions to their respective shares and the protection of existing diversions and uses. We shall discuss the necessity and propriety of the provision, so far as it is necessary to accomplish the first purpose, under our argument relating to validity, below. Here we shall only point out that Article 9(b) was understood and intended to protect existing uses.

### The Allocation of the Waters Was Made on the Basis of Existing Uses

It is important to notice here the basis for the division of the

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[3] Appendix IV (g), App. pp. 59-60.

[4] Appendix IV (s), App. p. 99.

[5] Appendix V, App. p. 107.

[6] Appendix IV (h), App. pp. 60-62; IV (k), App. pp. 90-91; IV (m), App. pp. 92-93.

waters between the two countries. The waters of the Rio Grande—and of the Colorado, incidentally—were allotted to the two countries on the basis of the rule, recognized by long usage and in many treaties, that diversions and uses of the waters of an international stream, existing on the date of the division of such waters by treaty, are entitled to be protected. This rule has come through long usage to be recognized as a controlling principle in the settlement of disputes over international waters[7] and hence a principle of international law or comity.[8]

The State Department and the American Section of the International Boundary and Water Commission repeatedly gave this as the rationale of the division of the waters,[9] as did Texas' official representative testifying in the Committee hearings.[10]

The majority report of the Senate Foreign Relations Committee, recommending the treaty favorably, stated, "There are a number of treaties among the civilized nations of the world relating to the distribution of waters of international streams. The United States is a party to two of them. In all of these treaties of which this committee is aware, existing uses at the time of the negotiations in the lower riparian state have been protected . . . " This report was adopted by an 18 to 4 vote.[11]

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[7] See brief on treaty precedents filed with the Senate Foreign Relations Committee by the International Boundary Commission, Appendix IV (j), App. pp. 63-90. See also Smith, Economic Uses of International Waters (London, 1931), 42, 145; Ray, Law and Practice in the Distribution of Waters of International Streams (1933, unpublished treatise, University of Texas library, copy of which will be furnished the court or adverse counsel on request).

[8] The Antelope (1825) 10 Wheat. (23 U.S.) 66, 120-121; 1 Moore, International Law Digest 7; Levi, "Law Making Treaties" (1944), 28 Minnesota Law Review 247.

[9] Appendix IV (c)-(e), App. pp. 55-59; IV (g), App. pp. 59-60; IV (i), App. p. 114; IV (g) and (h), App. pp. 95-98.

[10] Appendix IV (p), App. p. 94. See also the report of the "Committee of Seven," Appendix IV (e), App. pp. 91-93.

[11] Appendix V, App. pp. 103-104, 109.

The Senate so understood the basis of the allocation of waters by the treaty.[12]

The application of this rule resulted in the United States' being allotted much of the waters that arise in Mexico in addition to all of the flow of measured American tributaries and half of the unmeasured inflows. As Commissioner Lawson explained to the Senate Foreign Relations Committee:

> "Although, as I said before, approximately 70 percent of the natural flow of the Rio Grande is supplied by Mexican tributaries, the effect of the pending treaty will be to guarantee to the United States, on the basis of established beneficial uses, approximately one-half of the natural flow, plus about 60 per cent of all floodwaters which can be impounded in the contemplated international reservoirs, that is approximately 2,000,000 acre-feet, less chargeable losses, or sufficient water to make possible the irrigation of about 400,000 acres of land in the United States, in addition to the 500,000 acres now under irrigation." [13]

## Article 9(b) Was Intended To Protect Existing Diversions and Uses

Hence, the existing diversions in this country furnished the basis for the claim of the United States to more than half of the flow of the Rio Grande, though Mexican tributaries account for seventy per cent of that flow. It was the often expressed, deliberate intent of the treaty makers that these diversions and uses be protected by Article 9(b).

Thus the general counsel for the United States Section of the

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[12] Appendix VI (a) and (b), App. p. 110; VI (i) and (j), App. pp. 114-115.

[13] Appendix IV (e), App. pp. 57-59, last paragraph. See also Appendix IV (c), App. pp. 55-56; IV (p), App. p. 94; IV (r), App. pp. 96-98. And see Appendix III, App. p. 47, for a short analysis of the allocation of waters.

Commission testified:

> "The effect of (Article 9(b)) is that all existing diversions from the river and uses from the river in both countries are protected by the treaty . . . "[14]

The Department of State so understood and intended the provision, as is reflected by its memorandum filed with the committee:

> "Present existing uses in both countries are fully protected by the treaty. With respect to those to be made in the future, the sole province of the American Commissioner is to determine that, at the times and places where the diversions are proposed, there is sufficient water within the allocated share of the United States to satisfy the proposed use."[15]

The Senate Foreign Relations Committee's majority report, recommending that the Senate advise and consent to the ratification of the treaty, contains this statement relating to the portion of the treaty which has to do with the Rio Grande:

> "Existing uses are fully protected. As to any future uses, the sole function of the United States section is to determine that, at the time and place where the new diversion is proposed, there is sufficient water in the reservoirs or the river."[16]

This report was approved by a vote of 18-4.

The meaning of Article 9(b) was never discussed in the Senate debates on ratification. The question was by then closed

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[14] Appendix IV (g), App. p. 59-60.
[15] Appendix IV (s), App. p. 99.
[16] Appendix V, at App. p. 107.

to everyone's satisfaction.[17]

### The Intent To Protect Existing Uses Is Evident Elsewhere in the Treaty Itself

Moreover, this intent to protect existing uses is evident elsewhere in the treaty itself. Article 26 of the treaty provides:

> "During a period of eight years from the date of the entry in force of this Treaty, or until the beginning of operation of the lowest major international reservoir on the Rio Grande (Rio Bravo), should it be placed in operation prior to the expiration of said period, Mexico will cooperate with the United States to relieve, in times of drought, any lack of water *needed to irrigate the lands now under irrigation in the Lower Rio Grande Valley* in the United States . . . Mexico shall release . . . excess water that does not in the opinion of the Mexican Section have to be stored and that may be needed *for the irrigation of lands which were under irrigation during the year 1943 in the Lower Rio Grande Valley in the United States.*" (Emphasis added.)

Article 5 of the treaty provides for the construction of dams to control the Rio Grande's flow *"in a way to ensure the continuance of existing uses* and the development of the greatest number of feasible projects . . . " (Emphasis added.)

## ARTICLE 9(b) IS VALID

As we understand the opinion of the Court of Appeals, it states that Article 9(b) cannot be taken as a domestic law affecting the Defendants' asserted rights to divert waters of the Rio Grande because water law matters are within the province of the states

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[17] Even Texans were satisfied. Texas' Attorney General Grover Sellers testified: "Under articles 5 and 9 of the treaty, the existing diversions and uses along the Rio Grande in both countries are fully protected." Appendix IV (m), App. p. 92. See also Appendix IV (n), App. p. 93.

and because Article 9(b) would, if so construed, abridge vested rights of the Defendants. We shall deal with these questions in that order.

## Some Method of Enforcing the Allocation Was Necessary To Effect the Purposes of the Treaty

The treaty allocates the waters of the Lower Rio Grande between the two countries according to the formula set out in Article 4. This agreed division necessarily carried with it the obligation of the government to see that diversions in this country do not encroach on the share alloted to Mexico. This is an obligation of the United States of America, not of the State of Texas. It follows that the government of the United States must be in a position to enforce the allocation.

The reach of the Rio Grande involved in this treaty is 1200 miles long.[18] At the time the treaty was negotiated, an ever-expanding population was taxing the available flow.[19] As is here alleged, the supply is still inadequate to supply both the pre-treaty date uses and the defendants' uses (R. 20). Some method of restricting these diversions to the United States' share had to be made.[20]

The possibilities open to the United States were these:

1. It could enforce the system facetiously known along the Rio Grande as our system of "higherority": The highest upstream gets water. That is, the United States section could cut off all pumps below the point where the American water runs out, which

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[18] Appendix IV (e), App. p. 58.

[19] Appendix IV (a), App. p. 52; IV (b), App. p. 55.

[20] Note the solution suggested by the Court of Appeals: All the riparians on this 1200 mile reach are entitled to begin irrigation at any time, and "the Texas water laws and decisions are in hopeless confusion" (R. 107, Appendix VII, App. p. 139). But Texas laws control (R. 110-111, Appendix VII, App. pp. 141-142).

would vary daily.

2. It could authorize some official of this government to act as a water master and to direct who should divert, and when and how much.

3. It could write into the treaty some standard by which the right to make diversions would be ascertained. This latter course it took, and the standard adopted was this: Existing diversions may continue; new diversions may be begun only when water is available for them.

It is difficult to imagine how the United States could have injected itself less into the field of controlling diversions if it was to honor the treaty's allocation of waters.

The propriety of such a standard is pointed up by the situation which arose following a 1909 treaty between the United States and Great Britain apportioning the waters of the Niagara between Canada and the United States. After American diversions exceeding the flow alloted to the United States had occurred, the Secretary of State inquired whether he might enforce the allocation in the United States. The then Acting Attorney General advised that the provision alloting the water of itself limited American diversions, and that this provision "can be enforced by injunction or other proceedings in a court of law" [21] In 1919, by another opinion, the Attorney General advised the President, with respect to the same treaty, "You may invoke the aid of the courts . . . " in order to enforce the allocation of waters.[22]

Before the President or anyone else could enforce such a treaty, he would have to decide on a standard by which it should

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[21] 5 Hackworth, Digest of International Law 176.
[22] 30 Op. Att. Gen. 217.

be determined which diversions or uses should be curtailed. It would be absurd to argue that a treaty may delegate the duty to make such a standard but that the treaty itself may not provide that standard.

## The Standard Adopted Was Justified

As we have above demonstrated, the treaty divides the waters of the Rio Grande between the two countries on the basis of the principle that existing uses, as of the date of the settlement between nations of the distribution of the waters of an international stream, are entitled to be protected. At the time that the treaty was negotiated, Mexican uses were burgeoning and threatened to deplete drastically the flow of the lower Rio Grande, and Texas was impotent to prevent it.[23]

In this situation the treaty was negotiated and Article 9(b) was drafted, inserted in the treaty and ratified without criticism. Its effect, if it is enforced as it is literally drawn, will be to afford a measure of protection to those users whose industry and investment acquired for the United States the right to the share of water allotted it by the treaty. It is perfectly appropriate for the United States, when exercising its treaty power, to define those of its residents who are objects of the treaty's protection. It is especially appropriate that this class be defined as those whose activity and investment have acquired for the United States the right recognized by the treaty.

Stated conversely, the appellees are in the position of saying that even though the plaintiffs and other pre-treaty users ripened the claim to the United States' share of the flow under the stated rule of international practice, the defendants have an immutable

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[23] United States Constitution, Article I, Section 10. See Senator Connally's statement of the situation. Appendix VI (o), App. p. 111.

right to pre-empt that flow by the application of a different rule claimed to exist under state law.

> "Riparianism, pressed to the limits of its logic, enabled one to play dog-in-the-manger."[24]

Such a contention presupposes that international law is ineffectual as domestic law. Rather, international law is a part of the domestic law of the United States.[25]

## Riparian Rights To Waters For Irrigation Are Not Property Rights Protected By the Due Process Clause of the Fourteenth Amendment

It is clear that there is no federal constitutional objection to the qualification, or even the abolition, by a state of riparian rights theretofore regarded by the state as vested property rights.

> " . . . every state is free to change its laws governing riparian ownership and to permit the appropriation of flowing waters for such purposes as it may deem wise." [26]

In *U. S. vs. Gerlach Live Stock Co.*[27] the Supreme Court had occasion to review the water law of California because the Act of Congress there involved had adopted the state's law as the measure of federal liability for the water rights taken by a federal reclamation project. The Court said:

> "Riparianism, pressed to the limits of its logic, enabled one to play dog-in-the-manger. The shore proprietor could

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[24] Justice Jackson in U. S. vs. Gerlach Livestock Co. (1950) 339 U.S. 725.

[25] The Nereide (1815) 9 Cranch (13 U.S.) 388, 423; The Paquete Habano (1900) 175 U. S. 677, 700; See U.S.C.A. Title 18, Secs. 1651, 3058; Title 28, Secs. 1251, 1350.

[26] Connecticut v. Massachusetts (1931) 282 U.S. 660, 670. To the same effect, United States v. Rio Grande Irr. Co. (1899) 174 U.S. 690, 792.

[27] (1950) 339 U.S. 725.

enforce by injunction his bare technical right to have the natural flow of the stream, even if he was getting no substantial benefit from it. The canine element in the doctrine is abolished. (By the Amendment of California's Constitution next quoted:)

> "'The right to water, or to the use of flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served' . . . This limitation is not transgressed by the awards in question which only compensate for the loss of actual beneficial use . . ."

Thus the court treats as compensable only the "loss of actual beneficial use," because California had so qualified the rights of riparians, and because the state standard had been adopted by the Act of Congress authorizing the project as the measure of compensable rights. The "rights" taken were treated as compensable only because Congress had so directed.

If riparian rights were such property rights as are protected by the due process clause of the Fourteenth Amendment, the states could not abridge them, as they clearly may.

## Water Rights In Navigable Streams Are Not Property Protected By the Fifth Amendment

This Court has several times had occasion to examine the contention that a water right, vested in the view of the state, could not be impaired by Congress in its exercise of the commerce power.

In *U. S. v. Appalachian Electric Power Company,*[28] the defendant had acquired "as complete a right to the use of the ri-

[28] (1940) 311 U.S. 377.

parian lands, the water and river bed as can be obtained under state law." But the defendant declined to comply with such of the regulations, not relating to navigation, as the Federal Power Commission had prescribed. The defendant was enjoined from exercising its claimed water right. The court said:

> "The Federal Government has dominion over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; 'that the running water in a great navigable stream is capable of private ownership is inconceivable.' Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion."

In *U. S. v. Willow River Power Company*[29] the government had constructed a dam which interfered with the plaintiffs' claimed right as a riparian owner to the fall of the river for power generation purposes. The court said:

> " . . . The law long has recognized that the right of ownership in land may carry with it a legal right to enjoy some benefits from adjacent waters. But that a closed catalogue of abstract and absolute 'property rights' in water hovers over a given piece of shore land, good against all the world, is not in this day a permissible assumption." [30]

Until the treaty here in question dedicated its waters to other uses (see the preamble of the treaty, Appendix, p. 1) the lower Rio Grande was a federal and an international navigable stream.[31] The state could confer no vested right *in rem* to its waters.

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[29] (1945) 324 U.S. 499.

[30] See also Gibson v. U. S. (1897) 166 U.S. 269, and U.S. v. Commodore Park (1945) 324 U.S. 386.

[31] U.S. v. Rio Grande Irrigation Co. (1899) 174 U.S. 690; Treaty of Guadalupe Hidalgo (1848) 9 Stat. 922, Treaty Series 207, Article VII.

### An Interstate Compact May Properly Diminish a Water Right Vested In the State's View

On an interstate level, the question here posed was decided in *Hinderlider v. LaPlata, etc., Co.*[32]

Here a compact between Colorado and New Mexico had apportioned the waters of the LaPlata River between the two states. Prior to this compact, the plaintiff irrigation company had obtained a final adjudication by the state courts that it was entitled to a continuous diversion of 39½ second feet, subject only to one prior appropriation of 19 second feet. The Colorado Supreme Court held that the plaintiff company's right was a vested right such as could not be qualified or diminished by a compact and enjoined the state engineer from enforcing the compact against the plaintiff.

The case went by writ of certiorari to this court, which assumed that the plaintiffs' water right was as good a vested right as it was within the power of Colorado to grant. But, said the court, a compact is, granted Congressional consent, the equivalent of a treaty between nations. And such a compact, properly negotiated, bound the Colorado users and qualified their rights, however good and immutable in the state's view.

Article 9(b) is valid. The propriety of the treaty's allocation of the waters being unquestioned, the propriety of Article 9(b) follows.

## THE SENATE RESOLUTION OF ADVICE AND CONSENT DID NOT ALTER THE MEANING OF ARTICLE 9(b)

The Senate advised ratification of the treaty with the "under-

[32] (1938) 304 U.S. 92.

standing" that "the true meaning of the Treaty," was, *inter alia*:

> "(c) That nothing contained in the treaty or protocol shall be construed as authorizing the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, or the United States Section of said Commission, directly or indirectly to alter or control the distribution of water to users within the territorial limits of any of the individual States." [33]

This understanding does not say that nothing in the treaty shall be construed as affecting anyone's right to divert waters. Rather, it says that the specified officers shall not be authorized to alter or control distribution. The treaty, not the officers designated, makes the rule of law for which plaintiffs contend.

If paragraph (c) of the Senate resolution had abrogated Article 9(b), then the United States government would be obligated to restrict the total diversions in the United States, but none of the officials who have anything to do with administering the treaty could participate in making the restriction, and no criterion for the action would be indicated by the treaty. That is the logical result of the construction put on the treaty by the courts below. Both held that Article 9(b) had no effect as domestic law, but both admitted that each nation must limit the total diversions and uses in their countries (R. 52, 110, App. p. 141). Limiting total diversions in this country requires a decision as to which diversions shall be curtailed or prohibited. The quoted provision of the Senate resolution makes it clear that the Secretary of State and his subordinates shall not make such a decision. Therefore, if the only criterion in the treaty were eliminated by judicial exorcision, the President or some of his subordinates (other than those

[33] Appendix II, App. pp. 41, 43.

in the Department of State or the Commission) would have to act directly in the matter—without any standard provided by law. The only alternative is the national dishonor of failing to enforce the allocation of waters at all and the resultant international ill will.[34]

If the opinions of the courts below were thought to strike blows for "state's rights," they were so considered only because those courts failed to grasp the idea that either the treaty itself, or the executive of this country unaided by anything in the treaty, must somewhere draw a line on the ever-increasing diversions in this country.

## The Language of the Resolution Is Not So Calculated

Further, the Senate resolution does not alter the meaning of Article 9(b), because the language is not calculated to abrogate a plain provision of the treaty. The Senate resolution denominates paragraph (c) an understanding of the true meaning of the treaty. One cannot *understand* Article 9(b) not to prohibit new post-treaty diversions and uses absent the prescribed finding or agreement.

Again, paragraph (c) of the resolution states that the treaty shall not be "construed as authorizing" the designated officers to alter or control the distribution of waters in the states. Article 9(b) makes no grant of power. It simply gives the United States Section of the Commission the ministerial duty of ascertaining if and when water is available for new uses.

In short, the Senate resolution is not so worded as to abro-

[34] We discard the possibility of leaving to Texas the duty of enforcing a treaty obligation of the United States, and we trust that no argument is needed in respect to this.

gate Article 9(b). Rather, it provides simply that the designated officers shall not, by administrative action, set themselves up as water masters for the rivers involved. And no alteration of the meaning of Article 9(b) which could be wrought by the Senate resolution, short of outright abrogation of the former, suggests itself to us. So far as we can see, none suggested itself to the courts below.

Thus paragraph (c) of the Senate resolution did not repeal the provision of the second sentence of Article 9(b). Rather, it prevents the exercise, by the officers charged with the duty of administering the treaty, of the power which the executive of the United States must seize if the inhibition on new uses provided by Article 9(b) is not enforced.

## The Senate Resolution Was Not Intended To Affect Article 9(b)

If, however, it is necessary to look to the intent of the Senate as revealed in the record of its debates, it becomes plain that the Senate did not intend to change the meaning of Article 9(b).

Paragraph (c) of the Senate resolution was included solely to allay the fears of some Senators that great legislative and judicial powers could be arrogated to the State Department, the American Commissioner, or the American Section, so that they could generally control the use of waters in the several States. The understandings were added at the insistence, largely, of Senators whose states are in the Colorado basin. Article 9(b) applies only to waters of the Rio Grande and was not criticized.[35]

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[35] Numerous statements to the effect that no one objected to any part of the treaty so far as it applied to the Rio Grande were made on the Senate floor and were unchallenged. See Appendix VI (c) and (d), App. p. 111-112; VI (t), App. p. 121. Article 9(b) applies only to the Rio Grande, but some senators from states bordering on the Colorado objected strenuously that the treaty would give the Commission plenary authority to dictate who should divert, and how much and when. See Appendix VI (g), App. p. 113; VI (l), App. p. 116; VI (o), App. p. 119; VI (y), App. p. 126; VI (aa) and (bb), App. pp. 127-128.

Article 9(b) of the treaty is a provision of substantive law, and an explicit provision of the treaty. The Senate did not intend by its "understandings" to abrogate it. As Senator Connally explained on the Senate floor, "Without in any way changing the treaty, we propose to add these interpretative resolutions, saying that 'so and so', according to our view, means 'so and so' with the hope of satisfying Senators who have complained particularly about the language."[36] In short, the office of an "understanding" is to clear up an ambiguity, not to abrogate a plain provision.[37]

Even though the treaty itself and not the United States Section prescribes the inhibition on new uses and the United States Section is given only the ministerial function of ascertaining when water is available for new uses, it may be insisted that the United States Section could "indirectly" control distribution in Texas by withholding a finding of availability. The words "directly or indirectly" were added to paragraph (c) because some Senators from western states feared that the American Commissioner would indirectly interfere with state water law administration by obtaining the intervention of some other federal agency such as the Bureau of Reclamation.[38] No criticism of the ministerial function delegated to the American Section by Article 9(b) entered into this discussion.

Thus the very seizure of power which the addition of the words "directly or indirectly" was intended to prevent will be necessitated

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[36] Appendix VI (s), App. p. 121. See also Senator Connally's statement, "The language (of the understandings) will no doubt be changed in such a way as to satisfy those senators. I am willing to agree to the changes so long as they do not violate any of the explicit terms of the treaty." Appendix VI (r), App. p. 121.

[37] The American Bar Association's criticism of the treaty, which largely prompted the inclusion of paragraphs (b) and (c) in the Senate resolution, specifically said that that association had no quarrel with the merits of the treaty but only with the grant of excessive powers. Appendix VI (u), App. pp. 121-123; see 30 A.B.A.J. 661 and 31 A.B.A.J. 284.

[38] Appendix VI (w)-(dd), App. pp. 125-129.

by the construction put upon the treaty by the courts below.

In short, paragraph (c) of the Senate resolution did not divest the United States Section of the Commission of the ministerial function of making the findings there prescribed, nor did it abrogate Article 9(b). Rather, it makes clear that the officers named in paragraph (c) shall neither arrogate to themselves, nor procure others to exercise, judicial or legislative powers respecting the distribution of the waters allocated to the United States under the treaty.

## PLAINTIFFS MAY INVOKE ARTICLE 9(b) AS A RULE OF DECISION

There can be no doubt that Article 9(b) is self-executing. It is expressed as being effective from the date the treaty enters into force.[39] It prescribes a rule complete on its face,[40] and no legislative action is necessary to effect its object.[41]

### Plaintiffs May Invoke Article 9(b), Which Was Intended To Protect Existing Uses

When self-executing, "Treaties are the law of the land and a rule of decision in every court."[42] Self-executing provisions of a treaty may be invoked as a rule of decision by the government

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[39] Haver v. Yaker (1869) 9 Wall. (76 U.S.) 32; United Shoe Mach. Co. v. Duplessis Shoe Machinery Co. (1907) 155 Fed. 842, 845.

[40] Head Money Cases (1884) 112 U.S. 580, quoted in U. S. v. Rauscher (1886) 119 U.S. 407, 413, and in In Re Cooper (1892) 143 U. S. 472, 502. See also United Shoe Machinery Company vs. Duplessis Shoe Machinery Co., (1907) 155 Fed. 842.

[41] Indemnity Ins. Co. vs. Pan American Airways (1944) 58 F. Supp. 338, 340. See General Elec. Co. v. Robertson (1927) 21 F. 2d 214, 215-216. The treaty contains many provisions which are not self-executing. Such are all those provisions wherein the "Governments" undertake to pay costs, to study, to make further agreements, *etc.* See footnote 2, above.

[42] Strother v. Lucas (1838) 12 Pet. (37 U.S.) 410, 439.

on its own behalf,[43] ex relatio another,[44] or on behalf of others.[45] A state instrumentality may so invoke a treaty provision,[46] as may private citizens,[47] a foreign or domestic corporation,[48] or an individual alien.[49] The cases cited include criminal cases, civil forfeiture cases, and actions for damages, injunctions and recovery of realty.

But, as we understand the Court of Appeals' opinion, it held that plaintiff might not invoke Article 9(b) as a rule of domestic law because:

> " . . . If any intent had been present to create or protect or give a priority to individual property rights of one group resulting in the diminution or divestment of those of another group, the operative language would have been couched in more explicit terms" (R. 110, App. p. 141).

Of course, the language is explicit. It creates no "priorities." It simply prohibits the commencement of new diversions and uses absent the requisite ministerial finding or the agreement specified. It creates no rights to divert and use waters of the lower Rio Grande. Plaintiffs' rights to divert and use the water antedated the treaty. But enforcement of the provision on which plaintiffs rely will protect their water supply. We have above demonstrated that this was its intended effect. However, the Plaintiffs might invoke the provision as a rule of decision even if the protection which will result in its enforcement had not been (as it was) one of the motives for including Article 9(b) in the treaty.

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[43] U. S. v. 43 Gallons of Whiskey (1876) 93 U. S. 188.
[44] The Peggy (1802) 1 Cranch (5 U.S.) 103.
[45] McCauley v. Makak Indian Tribes (1942) 128 F. 2nd 867.
[46] New Orleans v. de Armas (1835) 9 Pet. (34 U.S.) 224.
[47] U. S. v. Percheman (1833) 8 Pet. (33 U.S.) 51; U. S. v. Rauscher (1886) 119 U. S. 407; Warren v. U. S. (1949) 179 F. 2nd 919.
[48] Society v. New Haven (1823) 8 Wheat (21 U.S.) 464; United Shoe Machinery Company v. Duplessis Shoe Machinery Co. (1907) 155 Fed. 842.
[49] Geofroy v. Riggs (1890) 133 U.S. 258.

## Plaintiffs Might Invoke the Treaty Provision Even If It Had Not Been Specifically Intended For Their Protection

Only once has this court seriously considered the contention that a self-executing treaty provision might not be invoked by one who would benefit therefrom, but for whose benefit the treaty was obviously not made.

This was in *U. S. v. Rauscher.*[50] Rauscher, the defendant, had been extradited pursuant to a treaty between the United States and Great Britain which provided that fugitives accused of certain enumerated crimes should be delivered up, but only upon such evidence as would justify commitment for trial in the country where the fugitive was apprehended. Rauscher was extradited upon an accusation of murdering one Janssen, but he was indicted and put to trial upon a charge of assaulting and inflicting cruel and unusual punishment on the deceased Janssen. The same occurrence was involved in the extradition charge and the indictment.

The circuit court certified this question to the Supreme Court:

> "'Second. Did or not the prisoner, under the extradition treaty with Great Britain, having been surrendered upon a charge of murder, acquire a right to be exempt from prosecution upon the charge set forth in the indictment, without being first afforded an opportunity to return to Great Britain?'"

The government contended that even if it should be violative of the treaty to put one on trial for an offense different from that for which he was extradited, such violation would be of concern only to the two governments, and that Rauscher could not invoke for his own protection treaty provisions not intended to protect him.

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[50] (1886) 119 U.S. 407.

The Supreme Court decided that it would be violative of the treaty to put the defendant to trial for an offense different from that for which he was extradited, that the treaty was the law of the land, and that the defendant had a right to invoke the treaty provision as such. It answered the certified question in the affirmative, the Chief Justice dissenting.

The treaty provisions invoked by Rauscher were hardly intended for his benefit. Article 9(b) *was* intended for the benefit of pre-treaty date users, but even if this were not so, they might still properly invoke its provisions.

It is not surprising that the point has not been raised from the time of the *Rauscher* case until this. The repeated declaration of this court forecloses the question: "Treaties are the law of the land, and a rule of decision in every court." [51]

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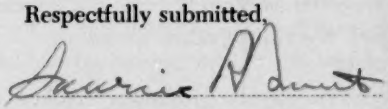
[51] Strother v. Lucas (1838) 12 Pet. (37 U.S.) 410, 439. See also American Insurance Company v. Canter (1828) 1 Pet (26 U.S.) 511; Society v. New Haven (1823) 8 Wheat (21 U.S.) 464. See 5 Hackworth, International Law Digest 183-4.

## CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,



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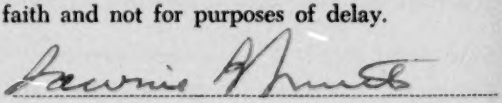
January, 1956

I, the undersigned member of the bar of this Court, of counsel for petitioners, certify that I have this 21st day of January, 1956, deposited in the United States postoffice, with first class postage prepaid, a copy of the foregoing petition for writ of certiorari, addressed to each of the below named attorneys, who are all of the attorneys for the respondents and all of the attorneys for the Defendants in the trial court. This petition is presented in good faith and not for purposes of delay.



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# APPENDIX I

## TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES RELATING TO THE UTILIZATION OF THE WATERS OF THE COLORADO AND TIJUANA RIVERS, AND OF THE RIO GRANDE, SIGNED ON FEBRUARY 3, 1944, AND A PROTOCOL SUPPLEMENTARY THERETO, SIGNED NOVEMBER 14, 1944, BOTH ENTERING INTO EFFECT ON NOVEMBER 8, 1945. (Treaty Series 994)

The Government of the United States of American and the Government of the United Mexican States: animated by the sincere spirit of cordiality and friendly cooperation which happily governs the relations between them; taking into account the fact that Articles VI and VII of the Treaty of Peace, Friendship and Limits between the United States of America and the United Mexican States signed at Guadalupe Hidalgo on February 2, 1848, and Article IV of the boundary treaty between the two countries signed at the City of Mexico December 30, 1853 regulate the use of the waters of the Rio Grande (Rio Bravo) and the Colorado River for purposes of navigation only; considering that the utilization of these waters for other purposes is desirable in the interest of both countries, and desiring, moreover, to fix and delimit the rights of the two countries with respect to the waters of the Colorado and Tijuana Rivers, and of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, United States of America, to the Gulf of Mexico, in order to obtain the most complete and satisfactory utilization thereof, have resolved to conclude a treaty and for this purpose have named as their plenipotentiaries:

The President of the United States of America:

Cordell Hull, Secretary of State of the United States of Ameri-

ca, George S. Messersmith, Ambassador Extraordinary and Plenipotentiary of the United States of America in Mexico, and Lawrence M. Lawson, United States Commissioner, International Boundary Commission, United States and Mexico; and

The President of the United Mexican States:

Francisco Castillo Nájera, Ambassador Extraordinary and Plenipoteniary of the United Mexican States in Washington, and Rafael Fernández MacGregor, Mexican Commissioner, International Boundary Commission, United States and Mexico; who, having communicated to each other their respective Full Powers and having found them in good and due form, have agreed upon the following:

## I—PRELIMINARY PROVISIONS

### ARTICLE 1

For the purposes of this Treaty it shall be understood that:

(a) "The United States" means the United States of America.

(b) "Mexico" means the United Mexican States.

(c) "The Commission" means the International Boundary and Water Commission, United States and Mexico, as described in Article 2 of this Treaty.

(d) "To divert" means the deliberate act of taking water from any channel in order to convey it elsewhere for storage, or to utilize it for domestic, agricultural, stock-raising or industrial purposes whether this be done by means of dams across the channel, partition weirs, lateral intakes, pumps or any other methods.

(e) "Point of diversion" means the place where the act of diverting the water is effected.

(f) "Conservation capacity of storage reservoirs" means that part of their total capacity devoted to holding and conserving the water for disposal thereof as and when required, that is, capacity additional to that provided for silt retention and flood control.

(g) "Flood discharges and spills" means the voluntary or involutary discharge of water for flood control as distinguished from releases for other purposes.

(h) "Return flow" means that portion of diverted water that eventually finds its way back to the source from which it was diverted.

(i) "Release" means the deliberate discharge of stored water for conveyance elsewhere or for direct utilization.

(j) "Consumptive use" means the use of water by evaporation, plant transpiration or other manner whereby the water is consumed and does not return to its source of supply. In general it is measured by the amount of water diverted less the part thereof which returns to the stream.

(k) "Lowest major international dam or reservoir" means the major international dam or reservoir situated farthest downstream.

(l) "Highest major international dam or reservoir" means the major international dam or reservoir situated farthest upstream.

ARTICLE 2

The International Boundary Commission established pursuant to the provisions of the Convention between the United States and Mexico signed in Washington March 1, 1889 to facilitate the carry-

ing out of the principles contained in the Treaty of November 12, 1884 and to avoid difficulties occasioned by reason of the changes which take place in the beds of the Rio Grande (Rio Bravo) and the Colorado River shall hereafter be known as the International Boundary and Water Commission, United States and Mexico, which shall continue to function for the entire period during which the present Treaty shall continue in force. Accordingly, the term of the Convention of March 1, 1889 shall be considered to be indefinitely extended, and the Convention of November 21, 1900 between the United States and Mexico regarding that Convention shall be considered completely terminated.

The application of the present Treaty, the regulation and exercise of the rights and obligations which the two Governments assume thereunder, and the settlement of all disputes to which its observance and execution may give rise are hereby entrusted to the International Boundary and Water Commission, which shall function in conformity with the powers and limitations set forth in this Treaty.

The Commission shall in all respects have the status of an international body, and shall consist of a United States Section and a Mexican Section. The head of each Section shall be an Engineer Commissioner. Wherever there are provisions in this Treaty for joint action or joint agreement by the two Governments, or for the furnishing of reports, studies or plans to the two Governments, or similar provisions, it shall be understood that the particular matter in question shall be handled by or through the Department of State of the United States and the Ministry of Foreign Relations of Mexico.

The Commission or either of its two Sections may employ such assistants and engineering and legal advisers as it may deem

necessary. Each Government shall accord diplomatic status to the Commissioner, designated by the other Government. The Commissioner, two principal engineers, a legal adviser, and a secretary, designated by each Government as members of its Section of the Commission, shall be entitled in the territory of the other country to the privileges and immunities appertaining to diplomatic officers. The Commission and its personnel may freely carry out their observations, studies and field work in the territory of either country.

The jurisdiction of the Commission shall extend to the limitrophe parts of the Río Grande (Río Bravo) and the Colorado River, to the land boundary between the two countries, and to works located upon their common boundary, each Section of the Commission retaining jurisdiction over that part of the works located within the limits of its own country. Neither Section shall assume jurisdiction or control over works located within the limits of the country of the other without the express consent of the Government of the latter. The works constructed, acquired or used in fulfillment of the provisions of this Treaty and located wholly within the territorial limits of either country, although these works may be international in character, shall remain, except as herein otherwise specifically provided, under the exclusive jurisdiction and control of the Section of the Commission in whose country the works may be situated.

The duties and powers vested in the Commission by this Treaty shall be in addition to those vested in the International Boundary Commission by the Convention of March 1, 1889 and other pertinent treaties and agreements in force between the two countries except as the provisions of any of them may be modified by the present Treaty.

Each Government shall bear the expenses incurred in the

maintenance of its Section of the Commission. The joint expenses, which may be incurred as agreed upon by the Commission, shall be borne equally by the two Governments.

ARTICLE 3

In matters in which the Commission may be called upon to make provision for the joint use of international waters, the following order of preferences shall serve as a guide:

1. Domestic and municipal uses.
2. Agriculture and stock-raising.
3. Electric power.
4. Other industrial uses.
5. Navigation.
6. Fishing and hunting.
7. Any other beneficial uses which may be determined by the Commission.

All of the foregoing uses shall be subject to any sanitary measures or works which may be mutually agreed upon by the two Governments, which hereby agree to give preferential attention to the solution of all border sanitation problems.

II—RIO GRANDE (RIO BRAVO)

ARTICLE 4

The waters of the Rio Grande (Rio Bravo) between Fort Quit-

man, Texas, and the Gulf of Mexico are hereby allotted to the two countries in the following manner:

A. To Mexico:

(a) All of the waters reaching the main channel of the Rio Grande (Rio Bravo) from the San Juan and Alamo Rivers, including the return flow from the lands irrigated from the latter two rivers.

(b) One-half of the flow in the main channel of the Rio Grande (Rio Bravo) below the lowest major international storage dam, so far as said flow is not specifically allotted under this Treaty to either of the two countries.

(c) Two-thirds of the flow reaching the main channel of the Rio Grande (Rio Bravo) from the Conchos, San Diego, San Rodrigo, Escondido and Salado Rivers and the Las Vacas Arroyo, subject to the provisions of subparagraph (c) of paragraph B of this Article.

(d) One-half of all other flows not otherwise allotted by this Article occurring in the main channel of the Rio Grande (Rio Bravo), including the contributions from all the unmeasured tributaries, which are those not named in this Article, between Fort Quitman and the lowest major international storage dam.

B. To the United States:

(a) All of the waters reaching the main channel of the Rio Grande (Rio Bravo) from the Pecos and Devils Rivers, Goodenough Spring, and Alamito, Terlingua, San Felipe and Pinto Creeks.

(b) One-half of the flow in the main channel of the

Rio Grande (Rio Bravo) below the lowest major international storage dam, so far as said flow is not specifically allotted under this Treaty to either of the two countries.

(c) One-third of the flow reaching the main channel of the Rio Grande (Rio Bravo) from the Conchos, San Diego, San Rodrigo, Escondido and Salado Rivers and the Las Vacas Arroyo, provided that this third shall not be less, as an average amount in cycles of five consecutive years, than 350,000 acre-feet (431,721,000 cubic meters) annually. The United States shall not acquire any right by the use of the waters of the tributaries named in this subparagraph, in excess of the said 350,000 acre-feet (431,721,000 cubic meters) annually, except the right to use one-third of the flow reaching the Rio Grande (Rio Bravo) from said tributaries, although such one-third may be in excess of that amount.

(d) One-half of all other flows not otherwise allotted by this Article occurring in the main channel of the Rio Grande (Rio Bravo), including the contributions from all the unmeasured tributaries, which are those not named in this Article, between Fort Quitman and the lowest major international storage dam.

In the event of extraordinary drought or serious accident to the hydraulic systems on the measured Mexican tributaries, making it difficult for Mexico to make available the run-off of 350,000 acre-feet (431,721,000 cubic meters) annually, allotted in subparagraph (c) of paragraph B of this Article to the United States as the minimum contribution from the aforesaid Mexican tributaries, any deficiencies existing at the end of the aforesaid five-year cycle shall be made up in the following five-year cycle with water from the

said measured tributaries.

Whenever the conservation capacities assigned to the United States in at least two of the major international reservoirs, including the highest major reservoir, are filled with waters belonging to the United States, a cycle of five years shall be considered as terminated and all debits fully paid, whereupon a new five-year cycle shall commence.

ARTICLE 5

The two Governments agree to construct jointly, through their respective Sections of the Commission, the following works in the main channel of the Río Grande (Río Bravo):

I. The dams required for the conservation, storage and regulation of the greatest quantity of the annual flow of the river in a way to ensure the continuance of existing uses and the development of the greatest number of feasible projects, within the limits imposed by the water allotments specified.

II. The dams and other joint works required for the diversion of the flow of the Río Grande (Río Bravo).

One of the storage dams shall be constructed in the section between Santa Helena Canyon and the mouth of the Pecos River; one in the section between Eagle Pass and Laredo, Texas (Piedras Negras and Nuevo Laredo in Mexico); and a third in the section between Laredo and Roma, Texas (Nuevo Laredo and San Pedro de Roma in Mexico). One or more of the stipulated dams may be omitted, and other than those enumerated may be built, in either case as may be determined by the Commission, subject to the approval of the two Governments.

In planning the construction of such dams the Commission shall determine:

(a) The most feasible sites;

(b) The maximum feasible reservoir capacity at each site;

(c) The conservation capacity required by each country at each site, taking into consideration the amount and regimen of its allotment of water and its contemplated uses;

(d) The capacity required for retention of silt;

(e) The capacity required for flood control.

The conservation and silt capacities of each reservoir shall be assigned to each country in the same proportion as the capacities required by each country in such reservoir for conservation purposes. Each country shall have an undivided interest in the flood control capacity of each reservoir.

The construction of the international storage dams shall start within two years following the approval of the respective plans by the two Governments. The works shall begin with the construction of the lowest major international storage dam, but works in the upper reaches of the river may be constructed simultaneously. The lowest major international storage dam shall be completed within a period of eight years from the date of the entry into force of this Treaty.

The construction of the dams and other joint works required for the diversion of the flows of the river shall be initiated on the dates recommended by the Commission and approved by the two Governments.

The cost of construction, operation and maintenance of each

of the international storage dams shall be prorated between the two Governments in proportion to the capacity allotted to each country for conservation purposes in the reservoir at such dam.

The cost of construction, operation and maintenance of each of the dams and other joint works required for the diversion of the flows of the river shall be prorated between the two Governments in proportion to the benefits which the respective countries receive therefrom, as determined by the Commission and approved by the two Governments.

ARTICLE 6

The Commission shall study, investigate, and prepare plans for flood control works, where and when necessary, other than those referred to in Article 5 of this Treaty, on the Rio Grande (Rio Bravo) for Fort Quitman, Texas, to the Gulf of Mexico. These works may include levees along the river, floodways, and grade-control structures, and works for the canalization, rectification and artificial channeling of reaches of the river. The Commission shall report to the two Governments the works which should be built, the estimated cost thereof, the part of the works to be constructed by each Government, and the part of the works to be operated and maintained by each Section of the Commission. Each Government agrees to construct, through its Section of the Commission, such works as may be recommended by the Commission and approved by the two Governments. Each Government shall pay the costs of the works constructed by it and the costs of operation and maintenance of the part of the works assigned to it for such purpose.

ARTICLE 7

The Commission shall study, investigate and prepare plans for

plants for generating hydro-electric energy which it may be feasible to construct at the international storage dams on the Rio Grande (Rio Bravo). The Commission shall report to the two Governments in a Minute the works which should be built, the estimated cost thereof, and the part of the works to be constructed by each Government. Each Government agrees to construct, through its Section of the Commission, such works as may be recommended by the Commission and approved by the two Governments. Both Governments, through their respective Sections of the Commission, shall operate and maintain jointly such hydro-electric plants. Each Government shall pay half the cost of the construction, operation and maintenance of such plants, and the energy generated shall be assigned to each country in like proportion.

ARTICLE 8

The two Governments recognize that both countries have a common interest in the conservation and storage of waters in the international reservoirs and in the maximum use of these structures for the purpose of obtaining the most beneficial, regular and constant use of the waters belonging to them. Accordingly, within the year following the placing in operation the first of the major international storage dams which is constructed, the Commission shall submit to each Government for its approval, regulations for the storage, conveyance and delivery of the waters of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, to the Gulf of Mexico. Such regulations may be modified, amended or supplemented when necessary by the Commission, subject to the approval of the two Governments. The following general rules shall severally govern until modified or amended by agreement of the Commission, with the approval of the two Governments:

(a) Storage in all major international reservoirs above the

lowest shall be maintained at the maximum possible water level, consistent with flood control, irrigation use and power requirements.

(b) Inflows to each reservoir shall be credited to each country in accordance with the ownership of such inflows.

(c) In any reservoir the ownership of water belonging to the country whose conservation capacity therein is filled, and in excess of that needed to keep it filled, shall pass to the other country to the extent that such country may have unfilled conservation capacity, except that one country may at its option temporarily use the conservation capacity of the other country not currently being used in any of the upper reservoirs; provided that in the event of flood discharge or spill occurring while one country is using the conservation capacity of the other, all of such flood discharge or spill shall be charged to the country using the other's capacity, and all inflow shall be credited to the other country until the flood discharge or spill ceases or until the capacity of the other country becomes filled with its own water.

(d) Reservoir losses shall be charged in proportion to the ownership of water in storage. Releases from any reservoir shall be charged to the country requesting them, except that releases for the generation of electrical energy, or other common purpose, shall be charged in proportion to the ownership of water in storage.

(e) Flood discharges and spills from the upper reservoirs shall be divided in the same proportion as the ownership of the inflows occuring at the time of such flood discharges and spills, except as provided in subparagraph (c) of this Article. Flood discharges and spills from the lowest reservoir shall be divided equally, except that one country, with the consent of the Commission, may use such part of the share of the other country as is not used by the latter country.

(f) Either of the two countries may avail itself, whenever it so desires, of any water belonging to it and stored in the international reservoirs, provided that the water so taken is for direct beneficial use or for storage in other reservoirs. For this purpose the Commissioner of the respective country shall give appropriate notice to the Commission, which shall prescribe the proper measures for the opportune furnishing of the water.

ARTICLE 9

(a) The channel of the Rio Grande (Rio Bravo) may be used by either of the two countries to convey water belonging to it.

(b) Either of the two countries may, at any point on the main channel of the river from Fort Quitman, Texas, to the Gulf of Mexico, divert and use the water belonging to it and may for this purpose construct any necessary works. However, no such diversion or use, not existing on the date this Treaty enters into force, shall be permitted in either country, nor shall works be constructed for such purpose, until the Section of the Commission in whose country the diversion or use is proposed has made a finding that the water necessary for such diversion or use is available from the share of that country, unless the Commission has agreed to a greater diversion or use as provided by paragraph (d) of this Article. The proposed use and the plans for the diversion works to be constructed in connection therewith shall be previously made known to the Commission for its information.

(c) Consumptive uses from the main stream and from the unmeasured tributaries below Fort Quitman shall be charged against the share of the country making them.

(d) The Commission shall have the power to authorize either

country to divert and use water not belonging entirely to such country, when the water belonging to the other country can be diverted and used without injury to the latter and can be replaced at some other point on the river.

(e) The Commission shall have the power to authorize temporary diversion and use by one country of water belonging to the other, when the latter does not need it or is unable to use it, provided that such authorization or the use of such water shall not establish any right to continue to divert it.

(f) In case of the occurrence of an extraordinary drought in one country with an abundant supply of water in the other country, water stored in the international storage reservoirs and belonging to the country enjoying such abundant water supply may be withdrawn, with the consent of the Commission, for the use of the country undergoing the drought.

(g) Each country shall have the right to divert from the main channel of the river any amount of water, including the water belonging to the other country, for the purpose of generating hydroelectric power, provided that such diversion causes no injury to the other country and does not interfere with the international generation of power and the quantities not returning directly to the river are charged against the share of the country making the diversion. The feasibility of such diversions not existing on the date this Treaty enters into force shall be determined by the Commission, which shall also determine the amount of water consumed, such water to be charged against the country making the diversion.

(h) In case either of the two countries shall construct works for diverting into the main channel of the Rio Grande (Rio Bravo) or its tributaries waters that do not at the time this Treaty enters into force contribute to the flow of the Rio Grande (Rio Bravo)

such water shall belong to the country making such diversion.

(i) Main stream channel losses shall be charged in proportion to the ownership of water being conveyed in the channel at the times and places of the losses.

(j) The Commission shall keep a record of the waters belonging to each country and of those that may be available at a given moment, taking into account the measurement of the allotments, the regulation of the waters in storage, the consumptive uses, the withdrawals, the diversions, and the losses. For this purpose the Commission shall construct, operate and maintain on the main channel of the Rio Grande (Rio Bravo), and each Section shall construct, operate and maintain on the measured tributaries in its own country, all the gaging stations and mechanical apparatus necessary for the purpose of making computations and of obtaining the necessary data for such record. The information with respect to the diversions and consumptive uses on the unmeasured tributaries shall be furnished to the Commission by the appropriate Section. The cost of construction of any new gaging stations located on the main channel of the Rio Grande (Rio Bravo) shall be borne equally by the two Governments. The operation and maintenance of all gaging stations or the cost of such operation and maintenance shall be apportioned between the two Sections in accordance with determinations to be made by the Commission.

## III—COLORADO RIVER

Of the waters of the Colorado River, from any and all sources, there are allotted to Mexico:

(a) A guaranteed annual quantity of 1,500,000 acre-feet (1,850,234,000 cubic meters) to be delivered in accordance with the

provisions of Article 15 of this Treaty.

(b) Any other quantities arriving at the Mexican points of diversion, with the understanding that in any year in which, as determined by the United States Section, there exists a surplus of waters of the Colorado River in excess of the amount necessary to supply users in the United States and the guaranteed quantity of 1,500,000 acre-feet (1,850,234,000 cubic meters) annually to Mexico, the United States undertakes to deliver to Mexico, in the manner set out in Article 15 of this Treaty, additional waters of the Colorado River system to provide a total quantity not to exceed 1,700,000 acre-feet (2,096,931,000 cubic meters) a year. Mexico shall acquire no right beyond that provided by this subparagraph by the use of the waters of the Colorado River system, for any purpose whatsoever, in excess of 1,500,000 acre-feet (1,850,234,000 cubic meters) annually.

In the event of extraordinary drought or serious accident to the irrigation system in the United States, thereby making it difficult for the United States to deliver the guaranteed quantity of 1,500,000 acre-feet (1,8500,234,000 cubic meters) a year, the water allotted to Mexico under subparagraph (a) of this Article will be reduced in the same proportion as consumptive uses in the United States are reduced.

ARTICLE 11

(a) The United States shall deliver all waters allotted to Mexico wherever these waters may arrive in the bed of the limitrophe section of the Colorado River, with the exceptions hereinafter provided. Such waters shall be made up of the waters of the said river, whatever their origin, subject to the provisions of the following paragraphs of this Article.

(b) Of the waters of the Colorado River allotted to Mexico by subparagraph (a) of Article 10 of this Treaty, the United States shall deliver, wherever such waters may arrive in the limitrophe section of the river, 1,000,000 acre-feet (1,233,489,000 cubic meters) annually from the time the Davis dam and reservoir are placed in operation until January 1, 1980 and thereafter 1,125,000 acre-feet (1,387,675,000 cubic meters) annually, except that, should the main diversion structure referred to in subparagraph (a) of Article 12 of this Treaty be located entirely in Mexico and should Mexico so request, the United States shall deliver a quantity of water not exceeding 25,000 acre-feet (30,837,000 cubic meters) annually, unless a larger quantity may be mutually agreed upon, at a point, to be likewise mutually agreed upon, on the international land boundary near San Luis, Sonora, in which event the quantities of 1,000,000 acre-feet (1,233,489,000 cubic meters) and 1,125,000 acre-feet (1,387,675,000 cubic meters) provided hereinabove as deliverable in the limitrophe section of the river shall be reduced by the quantities to be delivered in the year concerned near San Luis, Sonora.

(c) During the period from the time the Davis dam and reservoir are placed in operation until January 1, 1980, the United States shall also deliver to Mexico annually, of the water allotted to it, 500,000 acre-feet (616,745,000 cubic meters), and thereafter the United States shall deliver annually 375,000 acre-feet (462,558,000 cubic meters), at the international boundary line, by means of the All-American Canal and a canal connecting the lower end of the Pilot Knob Wasteway with the Alamo Canal or with any other Mexican canal which may be substituted for the Alamo Canal. In either event the deliveries shall be made at an operating water surface elevation not higher than that of the Alamo Canal at the point where it crossed the international boundary line in the year 1943.

(d) All the deliveries of water specified above shall be made subject to the provisions of Article 15 of this Treaty.

ARTICLE 12

The two Governments agree to construct the following works:

(a) Mexico shall construct at its expense, within a period of five years from the date of the entry into force of this Treaty, a main diversion structure below the point where the northernmost part of the international land boundary line intersects the Colorado River. If such diversion structure is located in the limitrophe section of the river, its location, design and construction shall be subject to the approval of the Commission. The Commission shall thereafter maintain and operate the structure at the expense of Mexico. Regardless of where such diversion structure is located, there shall simultaneously be constructed such levees, interior drainage facilities and other works, or improvements to existing works, as in the opinion of the Commission shall be necessary to protect lands within the United States against damage from such floods and seepage as might result from the construction, operation and maintenance of this diversion structure. These protective works shall be constructed, operated and maintained at the expense of Mexico by the respective Sections of the Commission, or under their supervision, each within the territory of its own country.

(b) The United States, within a period of five years from the date of the entry into force of this Treaty, shall construct in its own territory and at its expense, and thereafter operate and maintain at its expense, the Davis storage dam and reservoir, a part of the capacity of which shall be used to make possible the regulation at the boundary of the waters to be delivered to Mexico in accordance with the provisions of Article 15 of this Treaty.

(c) The United States shall construct or acquire in its own territory the works that may be necessary to convey a part of the waters of the Colorado River allotted to Mexico to the Mexican diversion points on the international land boundary line referred to in this Treaty. Among these works shall be included: the canal and other works necessary to convey water from the lower end of the Pilot Knob Wasteway to the international boundary, and, should Mexico request it, a canal to connect the main diversion structure referred to in subparagraph (a) of this Article, if this diversion structure should be built in the limitrophe section of the river, with the Mexican system of canals at a point to be agreed upon by the Commission on the international land boundary near San Luis, Sonora. Such works shall be constructed or acquired and operated and maintained by the United States Section at the expense of Mexico. Mexico shall also pay the costs of any sites or rights of way required for such works.

(d) The Commission shall construct, operate and maintain in the limitrophe section of the Colorado River, and each Section shall construct, operate and maintain in the territory of its own country on the Colorado River below Imperial Dam and on all other carrying facilities used for the delivery of water to Mexico, all necessary gaging stations and other measuring devices for the purpose of keeping a complete record of the waters delivered to Mexico and of the flows of the river. All data obtained as to such deliveries and flows shall be periodically compiled and exchanged between the two Sections.

ARTICLE 13

The Commission shall study, investigate and prepare plans for flood control on the Lower Colorado River between Imperial Dam

and the Gulf of California, in both the United States and Mexico, and shall, in a Minute, report to the two Governments the works which should be built, the estimated cost thereof, and the part of the works to be constructed by each Government. The two Governments agree to construct, through their respective Sections of the Commission, such works as may be recommended by the Commission and approved by the two Governments, each Government to pay the costs of the works constructed by it. The Commission shall likewise recommend the parts of the works to be operated and maintained jointly by the Commission and the parts to be operated and maintained by each Section. The two Governments agree to pay in equal shares the cost of joint operation and maintenance, and each Government agrees to pay the cost of operation and maintenance of the works assigned to it for such purpose.

ARTICLE 14

In consideration of the use of the All-American Canal for the delivery to Mexico, in the manner provided in Articles 11 and 15 of this Treaty, of a part of its allotment of the waters of the Colorado River, Mexico shall pay to the United States:

(a) A proportion of the costs actually incurred in the construction of Imperial Dam and the Imperial Dam-Pilot Knob section of the All-American Canal, this proportion and the method and terms of repayment to be determined by the two Governments, which, for this purpose, shall take into consideration the proportionate uses of these facilities by the two countries, these determinations to be made as soon as Davis dam and reservoir are placed in operation.

(b) Annually, a proportionate part of the total costs of main-

tenance and operation of such facilities, these costs to be prorated between the two countries in proportion to the amount of water delivered annually through such facilities for use in each of the two countries.

In the event that revenues from the sale of hydroelectric power which may be generated at Pilot Knob become available for the amortization of part or all of the costs of the facilities named in subparagraph (a) of this Article, the part that Mexico should pay of the costs of said facilities shall be reduced or repaid in the same proportion as the balance of the total costs are reduced or repaid. It is understood that any such revenue shall not become available until the cost of any works which may be constructed for the generation of hydro-electric power at said location has been fully amortized from the revenues derived therefrom.

### ARTICLE 15

A. The water allotted in subparagraph (a) of Article 10 of this Treaty shall be delivered to Mexico at the points of delivery specified in Article 11, in accordance with the following two annual schedules of deliveries by months, which the Mexican Section shall formulate and present to the Commission before the beginning of each calendar year:

#### SCHEDULE I

Schedule I shall cover the delivery, in the limitrophe section of the Colorado River, of 1,000,000 acre-feet (1,233,489,000 cubic meters) of water each year from the date Davis dam and reservoir are placed in operation until January 1, 1980 and the delivery of 1,125,000 acre-feet (1,387,675,000 cubic meters) of

water each year thereafter. This schedule shall be formulated subject to the following limitations:

With reference to the 1,000,000 acre-foot (1,233,489,000 cubic meter) quantity:

(a) During the months of January, February, October, November and December the prescribed rate of delivery shall be not less than 600 cubic feet (17.0 cubic meters) nor more than 3,500 cubic feet (99.1 cubic meters) per second.

(b) During the remaining months of the year the prescribed rate of delivery shall be not less than 1,000 cubic feet (28.3 cubic meters) nor more than 3,500 cubic feet (99.1 cubic meters) per second.

With reference to the 1,125,000 acre-foot (1,387,675,000 cubic meter) quantity:

(a) During the months of January, February, October, November and December the prescribed rate of delivery shall be not less than 675 cubic feet (19.1 cubic meters) nor more than 4,000 cubic feet (113.3 cubic meters) per second.

(b) During the remaining months of the year the prescribed rate of delivery shall be not less than 1,125 cubic feet (31.9 cubic meters) nor more than 4,000 cubic feet (113.3 cubic meters) per second.

Should deliveries of water be made at a point on the land boundary near San Luis, Sonora, as provided for in Article 11, such deliveries shall be made under a sub-schedule to be formulated and

furnished by the Mexican Section. The quantities and monthly rates of deliveries under such sub-schedule shall be in proportion to those specified for Schedule I, unless otherwise agreed upon by the Commission.

SCHEDULE II

Schedule II shall cover the delivery at the boundary line by means of the All-American Canal of 500,000 acre-feet (616,745,000 cubic meters) of water each year from the date Davis dam and reservoir are placed in operation until January 1, 1980 and the delivery of 375,000 acre-feet (462,558,000 cubic meters) of water each year thereafter. This schedule shall be formulated subject to the following limitations:

With reference to the 500,000 acre-foot (616,745,000 cubic meter) quantity:

(a) During the months of January, February, October, November and December the prescribed rate of delivery shall be not less than 300 cubic feet (8.5 cubic meters) nor more than 2,000 cubic feet (56.6 cubic meters) per second.

(b) During the remaining months of the year the prescribed rate of delivery shall be not less than 500 cubic feet (14.2 cubic meters) nor more than 2,000 cubic feet (56.6 cubic meters) per second.

With reference to the 375,000 acre-feet (462,558,000 cubic meter) quantity:

(a) During the months of January, February, October, November and December the prescribed rate of de-

livery shall be not less than 225 cubic feet (6.4 cubic meters) nor more than 1,500 cubic feet (42.5 cubic meters) per second.

(b) During the remaining months of the year the prescribed rate of delivery shall be not less than 375 cubic feet (10.6 cubic meters) nor more than 1,500 cubic feet (42.5 cubic meters) per second.

B. The United States shall be under no obligation to deliver through the All-American Canal, more than 500,000 acre-feet (616,745,000 cubic meters) annually from the date Davis dam and reservoir are placed in operation until January 1, 1980 or more than 375,000 acre-feet (462,558,000 cubic meters) annually thereafter. If, by mutual agreement, any part of the quantities of water specified in this paragraph are delivered to Mexico at points on the land boundary otherwise than through the All-American Canal, the above quantities of water and the rates of deliveries set out under Schedule II of this Article shall be correspondingly diminished.

C. The United States shall have the option of delivering, at the point on the land boundary mentioned in subparagraph (c) of Article 11, any part or all of the water to be delivered at that point under Schedule 11 of this Article during the months of January, February, October, November and December of each year, from any source whatsoever, with the understanding that the total specified annual quantities to be delivered through the All-American Canal shall not de reduced because of the exercise of this option, unless such reduction be requested by the Mexican Section, provided that the exercise of this option shall not have the effect of increasing the total amount of scheduled water to be delivered to Mexico.

(TEXT OF TREATY, CONTINUED)

D. In any year in which there shall exist in the river water in excess of that necessary to satisfy the requirements in the United States and the guaranteed quantity of 1,500,000 acre-feet (1,850,-234,000 cubic meters) allotted to Mexico, the United States hereby declares its intention to cooperate with Mexico in attempting to supply additional quantities of water through the All-American Canal as such additional quantities are desired by Mexico, if such use of the Canal and facilities will not be detrimental to the United States, provided that the delivery of any additional quantities through the All-American Canal will not have the effect of increasing the total scheduled deliveries to Mexico. Mexico hereby declares its intention to cooperate with the United States by attempting to curtail deliveries of water through the All-American Canal in years of limited supply, if such curtailment can be accomplished without detriment to Mexico and is necessary to allow full use of all available water supplies, provided that such curtailment shall not have the effect of reducing the total scheduled deliveries of water to Mexico.

E. In any year in which there shall exist in the river water in excess of that necessary to satisfy the requirements in the United States and the guaranteed quantity of 1,500,000 acre-feet (1,850,-234,000 cubic meters) allotted to Mexico, the United States Section shall so inform the Mexican Section in order that the latter may schedule such surplus water to complete a quantity up to a maximum of 1,700,000 acre-feet (2,096,931,000 cubic meters). In this circumstance the total quantities to be delivered under Schedules I and II shall be increased in proportion to their respective total quantities and the two schedules thus increased shall be subject to the same limitations as those established for each under paragraph A of this Article.

F. Subject to the limitations as to rates of deliveries and total

quantities set out in Schedules I and II, Mexico shall have the right, upon thirty days notice in advance to the United States Section, to increase or decrease each monthly quantity prescribed by those schedules by not more than 20% of the monthly quantity.

G. The total quantity of water to be delivered under Schedule I of paragraph A of this Article may be increased in any year if the amount to be delivered under Schedule II is correspondingly reduced and if the limitations as to rates of delivery under each schedule are correspondingly increased and reduced.

## IV—TIJUANA RIVER

### ARTICLE 16

In order to improve existing uses and to assure any feasible further development, the Commission shall study and investigate, and shall submit to the two Governments for their approval:

(1) Recommendations for the equitable distribution between the two countries of the waters of the Tijuana River system;

(2) Plans for storage and flood control to promote and develop domestic, irrigation, and other feasible uses of the waters of this system;

(3) An estimate of the cost of the proposed works and the manner in which the construction of such works or the cost thereof should be divided between the two Governments;

(4) Recommendations regarding the parts of the works to be operated and maintained by the Commission and the parts to be operated and maintained by each Section.

The two Governments through their respective Sections of the Commission shall construct such of the proposed works as are approved by both Governments, shall divide the work to be done or

the cost thereof, and shall distribute between the two countries the waters of the Tijuana River system in the proportions approved by the two Governments. The two Governments agree to pay in equal shares the costs of joint operation and maintenance of the works involved, and each Government agrees to pay the cost of operation and maintenance of the works assigned to it for such purpose.

## V.—GENERAL PROVISIONS

### ARTICLE 17

The use of the channels of the international rivers for the discharge of flood or other excess waters shall be free and not subject to limitation by either country, and neither country shall have any claim against the other in respect of any damage caused by such use. Each Government agrees to furnish the other Government, as far in advance as practicable, any information it may have in regard to such extraordinary discharges of water from reservoirs and flood flows on its own territory as may produce floods on the territory of the other.

Each Government declares its intention to operate its storage dams in such manner, consistent with the normal operations of its hydraulic systems, as to avoid, as far as feasible, material damage in the territory of the other.

### ARTICLE 18

Public use of the water surface of lakes formed by international dams shall, when not harmful to the services rendered by such dams, be free and common to both countries, subject to the police regulations of each country in its territory to such general regula-

tions as may appropriately be prescribed and enforced by the Commission with the approval of the two Governments for the purpose of the application of the provisions of this Treaty, and to such regulations as may appropriately be prescribed and enforced for the same purpose by each Section of the Commission with respect to the areas and borders of such parts of those lakes as lie within its territory. Neither Government shall use for military purposes such water surface situated within the territory of the other country except by express agreement between the two Governments.

ARTICLE 19

The two Governments shall conclude such special agreements as may be necessary to regulate the generation, development and disposition of electric power at international plants, including the necessary provisions for the export of electric current.

ARTICLE 20

The two Governments shall, through their respective Sections of the Commission, carry out the construction of works allotted to them. For this purpose the respective Sections of the Commission may make use of any competent public or private agencies in accordance with the laws of the respective countries. With respect to such works as either Section of the Commission may have to execute on the territory of the other, it shall, in the execution of such works, observe the laws of the place where such works are located or carried out, with the exceptions hereinafter stated.

All materials, implements, equipment and repair parts intended for the construction, operation and maintenance of such works shall be exempt from import and export customs duties. The whole

of the personnel employed either directly or indirectly on the construction, operation or maintenance of the works may pass freely from one country to the other for the purpose of going to and from the place of location of the works, without any immigration restrictions, passports or labor requirements. Each Government shall furnish, through its own Section of the Commission, convenient means of identification to the personnel employed by it on the aforesaid works and verification certificates covering all materials, implements, equipment and repair parts intended for the works.

Each Government shall assume responsibility for an shall adjust exclusively in accordance with its own laws all claims arising within its territory in connection with the construction, operation or maintenance of the whole or of any part of the works herein agreed upon, or of any works which may, in the execution of this Treaty, be agreed upon in the future.

ARTICLE 21

The construction of the international dams and the formation of artificial lakes shall produce no change in the fluvial international boundary, which shall continue to be governed by existing treaties and conventions in force between the two countries.

The Commission shall, with the approval of the two Governments, establish in the artificial lakes, by buoys or by other suitable markers, a practicable and convenient line to provide for the exercise of the jurisdiction and control vested by this Treaty in the Commission and its respective Sections. Such line shall also mark the boundary for the application of the customs and police regulations of each country.

(TEXT OF TREATY, CONTINUED)

ARTICLE 22

The provisions of the Convention between the United States and Mexico for the rectification of the Rio Grande (Rio Bravo) in the El Paso- Juárez Valley signed on February 1, 1933, shall govern, so far as delimitation of the boundary, distribution of jurisdiction and sovereignty, and relations with private owners are concerned, in any places where works for the artificial channeling, canalization or rectification of the Rio Grande (Rio Bravo) and the Colorado River are carried out.

ARTICLE 23

The two Governments recognize the public interest attached to the works required for the execution and performance of this Treaty and agree to acquire, in accordance with their respective domestic laws, any private property that may be required for the construction of the said works, including the main structures and their appurtenances and the construction materials therefor, and for the operation and maintenance thereof, at the cost of the country within which the property is situated, except as may be otherwise specifically provided in this Treaty.

Each Section of the Commission shall determine the extent and location of any private property to be acquired within its own country and shall make the necessary requests upon its Government for the acquisition of such property.

The Commission shall determine the cases in which it shall become necessary to locate works for the conveyance of water or electrical energy and for the servicing of any such works, for the benefit of either of the two countries, in the territory of the other

country, in order that such works can be built pursuant to agreement between the two Governments. Such works shall be subject to the jurisdiction and supervision of the Section of the Commission within whose country they are located.

Construction of the works built in pursuance of the provisions of this Treaty shall not confer upon either of the two countries any rights either of property or of jurisdiction over any part whatsoever of the territory of the other. These works shall be part of the territory and be the property of the country wherein they are situated. However, in the case of any incidents occurring on works constructed across the limitrophe part of a river and with supports on both banks, the jurisdiction of each country shall be limited by the center line of such works, which shall be marked by the Commission, without thereby changing the international boundary.

Each Government shall retain, through its own Section of the Commission and within the limits and to the extent necessary to effectuate the provisions of this Treaty, direct ownership, control and jurisdiction within its own territory and in accordance with its own laws, over all real property—including that within the channel of any river—rights of way and rights *in rem*, that it may be necessary to enter upon and occupy for the construction, operation or maintenance of all the works constructed, acquired or used pursuant to this Treaty. Furthermore, each Government shall similarly acquire and retain in its own possession the titles, control and jurisdiction over such works.

ARTICLE 24

The International Boundary and Water Commission shall have, in addition to the powers and duties otherwise specifically provided

in this Treaty, the following powers and duties:

(a) To initiate and carry on investigations and develop plans for the works which are to be constructed or established in accordance with the provisions of this and other treaties or agreements in force between the two Governments dealing with boundaries and international waters; to determine, as to such works, their location, size, kind and characteristic specifications; to estimate the cost of such works; and to recommend the division of such costs between the two Governments, the arrangements for the furnishing of the necessary funds, and the dates for the beginning of the works, to the extent that the matters mentioned in this subparagraph are not otherwise covered by specific provisions of this or any other Treaty.

(b) To construct the works agreed upon or to supervise their construction and to operate and maintain such works or to supervise their operation and maintenance, in accordance with the respective domestic laws of each country. Each Section shall have, to the extent necessary to give effect to the provisions of this Treaty, jurisdiction over the works constructed exclusively in the territory of its country whenever such works shall be connected with or shall directly affect the execution of the provisions of this Treaty.

(c) In general to exercise and discharge the specific powers and duties entrusted to the Commission by this and other treaties and agreements in force between the two countries, and to carry into execution and prevent the violation of the provisions of those treaties and agreements. The authorities of each country shall aid and support the exercise and discharge of these powers and duties, and each Commissioner shall invoke when necessary the jurisdiction of the courts or other appropriate agencies of his country to aid in the execution and enforcement of these powers and duties.

(d) To settle all differences that may arise between the two

Governments with respect to the interpretation or application of this Treaty, subject to the approval of the two Governments. In any case in which the Commissioners do not reach an agreement, they shall so inform their respective governments reporting their respective opinions and the grounds therefor and the points upon which they differ, for discussion and adjustment of the difference through diplomatic channels and for application where proper of the general or special agreements which the two Governments have concluded for the settlement of controversies.

(e) To furnish the information requested of the Commissioners jointly by the two Governments on matters within their jurisdiction. In the event that the request is made by one Government alone, the Commissioner of the other Government must have the express authorization of his Government in order to comply with such request.

(f) The Commission shall construct, operate and maintain upon the limitrophe parts of the international streams, and each Section shall severally construct, operate, and maintain upon the parts of the international streams and their tributaries within the boundaries of its own country, such stream gaging stations as may be needed to provide the hydrographic data necessary or convenient for the proper functioning of this Treaty. The data so obtained shall be compiled and periodically exchanged between the two Sections.

(g) The Commission shall submit annually a joint report to the two Governments on the matters in its charge. The Commission shall also submit to the two Governments joint reports on general or any particular matters at such other times as it may deem necessary or as may be requested by the two Governments.

ARTICLE 25

Except as otherwise specifically provided in this Treaty, Arti-

cles III and VII of the Convention of March 1, 1889 shall govern the proceedings of the Commission in carrying out the provisions of this Treaty. Supplementary thereto the Commission shall establish a body of rules and regulations to govern its procedure, consistent with the provisions of this Treaty and of Articles III and VII of the Convention of March 1, 1889 and subject to the approval of both Governments.

Decisions of the Commission shall be recorded in the form of Minutes done in duplicate in the English and Spanish languages, signed by each Commissioner and attested by the Secretaries, and copies thereof forwarded to each Government within three days after being signed. Except where the specific approval of the two Governments is required by any provision of this Treaty, if one of the Governments fails to communicate to the Commission its approval or disapproval of a decision of the Commission within thirty days reckoned from the date of the Minute in which it shall have been pronounced, the Minute in question and the decisions which it contains shall be considered to be approved by that Government. The Commissioners, within the limits of their respective jurisdictions, shall execute the decsions of the Commission that are approved by both Governments.

If either Government disapproves a decision of the Commission the two Governments shall take cognizance of the matter, and if an agreement regarding such matter is reached between the two Governments, the agreement shall be communicated to the Commissioners, who shall take such further proceedings as may be necessary to carry out such agreement.

## VI—TRANSITORY PROVISIONS

During a period of eight years from the date of the entry into

force of this Treaty, or until the beginning of operation of the lowest major international reservoir on the Río Grande (Río Bravo), should it be placed in operation prior to the expiration of said period, Mexico will cooperate with the United States to relieve, in times of drought, any lack of water needed to irrigate the lands now under irrigation in the Lower Río Grande Valley in the United States, and for this purpose Mexico will release water from El Azúcar reservoir on the San Juan River and allow that water to run through its system of canals back into the San Juan River in order that the United States may divert such water from the Río Grande (Río Bravo). Such releases shall be made on condition that they do not affect the Mexican irrigation system, provided that Mexico shall, in any event, except in cases of extraordinary drought or serious accident to its hydraulic works, release and make available to the United States for its use the quantities requested, under the following conditions: that during the said eight years there shall be made available a total of 160,000 acre-feet (197,358,000 cubic meters) and up to 40,000 acre-feet (49,340,000 cubic meters) in any one year; that the water shall be made available as requested at rates not exceeding 750 cubic feet (21.2 cubic meters) per second; that when the rates of flow requested and made available have been more than 500 cubic feet (14.2 cubic meters) per second the period of release shall not extend beyond fifteen consecutive days; and at least thirty days must elapse between any two periods of release during which rates of flow in excess of 500 cubic feet (14.2 cubic meters) per second have been requested and made available. In addition to the guaranteed flow, Mexico shall release from El Azúcar reservoir and conduct through its canal system and the San Juan River, for use in the United States during periods of drought and after satisfying the needs of Mexican users, any excess water that does not in the opinion of the Mexican

Section have to be stored and that may be needed for the irrigation of lands which were under irrigation during the year 1943 in the Lower Rio Grande Valley in the United States.

ARTICLE 27

The provisions of Article 10, 11, and 15 of this Treaty shall not be applied during a period of five years from the date of the entry into force of this Treaty, or until the Davis dam and the major Mexican diversion structure on the Colorado River are placed in operation, should these works be placed in operation prior to the expiration of said period. In the meantime Mexico may construct and operate at its expense a temporary diversion structure in the bed of the Colorado River in territory of the United States for the purpose of diverting water into the Alamo Canal, provided that the plans for such structure and the construction and operation thereof shall be subject to the approval of the United States Section. During this period of time the United States will make available in the river at such diversion structure river flow not currently required in the United States, and the United States will cooperate with Mexico to the end that the latter may satisfy its irrigation requirements within the limits of those requirements for lands irrigated in Mexico from the Colorado River during the year 1943.

## VII—FINAL PROVISIONS

ARTICLE 28

This Treaty shall be ratified and the ratifications thereof shall be exchanged in Washington. It shall enter into force on the day of the exchange of ratifications and shall continue in force until terminated by another Treaty concluded for that purpose between the two Governments.

In witness whereof the respective Plenipotentiaries have signed this Treaty and have hereunto affixed their seals.

Done in duplicate in the English and Spanish languages, in Washington on this third day of February, 1944.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

CORDELL HULL (SEAL)
GEORGE S. MESSERSMITH (SEAL)
LAWRENCE M. LAWSON (SEAL)

FOR THE GOVERNMENT OF THE UNITED STATES OF MEXICO:

RAFAEL FERNANDEZ MACGREGOR (SEAL)
F. CASTILLO NAJERA (SEAL)

## PROTOCOL

The Government of the United States of America and the Government of the United Mexican States agree and understand that:

Wherever, by virtue of the provisions of the Treaty between the United States of America and the United Mexican States, signed in Washington on February 3, 1944, relating to the utilization of the waters of the Colorado and Tijuana Rivers and of the Rio Grande from Fort Quitman, Texas, to the Gulf of Mexico, specific functions are imposed on, or exclusive jurisdiction is vested in, either of the Sections of the International Boundary and Water Commission, which involve the construction or use of works for storage or conveyance of water, flood control, steam gaging, or for any other purpose, which are situated wholly within the territory of the country of that Section, and which are to be used only partly

for the performance of treaty provisions, such jurisdiction shall be exercised, and such functions, including the construction, operation and maintenance of the said works, shall be performed and carried out by the Federal agencies of that country which now or hereafter may be authorized by domestic law to construct, or to operate and maintain, such works. Such functions or jurisdiction shall be exercised in conformity with the provisions of the Treaty and in cooperation with the respective Section of the Commission, to the end that all international obligations and functions may be coordinated and fulfilled.

The works to be constructed or used on or along the boundary, and those to be constructed or used exclusively for the discharge of treaty stipulations, shall be under the jurisdiction of the Commission or of the respective Section, in accordance with the provisions of the Treaty. In carrying out the construction of such works the Sections of the Commission may utilize the services of public or private organizations in accordance with the laws of their respective countries.

This Protocol, which shall be regarded as an integral part of the aforementioned Treaty signed in Washington on February 3, 1944, shall be ratified and the ratifications thereof shall be exchanged in Washington. This Protocol shall be effective beginning the day of the entry into force of the Treaty and shall continue effective so long as the Treaty remains in force.

In witness whereof the respective Plenipotentiaries have signed this Protocol and have hereunto affixed their seals.

Done in duplicate, in the English and Spanish languages, in Washington, this fourteenth day of November, 1944.

(PROTOCOL, CONTINUED)

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

E. R. STETTINIUS JR. (SEAL)
Acting Secretary of State of the
United States of America.

FOR THE GOVERNMENT OF THE UNITED STATES OF MEXICO:

F. CASTILLO NAJERA (SEAL)
Ambassador Extraordinary and Plenipotentiary
of the United Mexican States in Washington.

# APPENDIX II

SENATE RESOLUTION ADVISING AND CONSENTING TO THE RATIFICATION OF THE TREATY. (Treaty Series 994) 994)

"Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of Executive A, Seventy-eighth Congress, second session, a treaty between the United States of America and the United Mexican States, signed at Washington on February 3, 1944, relating to the utilization of the waters of the Colorado and Tijuana Rivers and of the Rio Grande from Fort Quitman, Texas, to the Gulf of Mexico, and Executive H, Seventy-eighth Congress, second session, a protocol, signed at Washington on November 14, 1944, supplementary to the treaty, subject to the following understandings, and that these understandings will be mentioned in the ratification of this treaty as conveying the true meaning of the treaty, and will in effect form a part of the treaty:

"(a) That no commitment for works to be built by the United States in whole or in part at its expense, or for expenditures by the United States, other than those specifically provided for in the treaty, shall be made by the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Waer Commission, the United States Section of said Commission, or any other officer or employee of the United States, without prior approval of the Congress of the United States. It is understood that the works to be built by the United States, in whole or in part at its expense, and the expenditures by the United States, which are specifically provided for in the treaty, are as follows:

"1. The joint construction of the three storage and flood-control dams on the Rio Grande below Fort Quitman, Texas, mentioned in article 5 of the treaty.

"2. The dams and other joint works required for the diversion of the flow of the Rio Grande mentioned in subparagraph II of article 5 of the treaty, it being understood that the commitment of the United States to make expenditures under this subparagraph is limited to its share of the cost of one dam and works appurtenant thereto.

"3. Stream-gaging stations which may be required under the provisions of section (j) of article 9 of the treaty and of subparagraph (d) of article 12 of the treaty.

"4. The Davis Dam and Reservoir mentioned in subparagraph (b) of article 12 of the treaty.

"5. The joint flood-control investigations, preparation of plans, and reports on the Rio Grande below Fort Quitman required by the provisions of article 6 of the treaty.

"6. The joint flood-control investigations, preparations of plans, and reports on the lower Colorado River between the Imperial Dam and the Gulf of California required by article 13 of the treaty.

"7. The joint investigations, preparations of plans, and reports on the establishment of hydroelectric plants at the international dams on the Rio Grande below Fort Quitman provided for by article 7 of the treaty.

"8. The studies, investigations, preparation of plans, recommendations, reports, and other matters dealing with the Tijuana River system provided for by the first paragraph (including the numbered subparagraphs) of article 16 of the treaty.

"(b) Insofar as they affect persons and property in the terri-

torial limits of the United States, the powers and functions of the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, the United States Section of said Commission, and any other officer or employee of the United States, shall be subject to the statutory and constitutional controls and processes. Nothing contained in the treaty or protocol shall be construed as impairing the power of the Congress of the United States to define the terms of office of members of the United States Section of the International Boundary and Water Commission or to provide for their appointment by the President by and with the advice and consent of the Senate or otherwise.

"(c) That nothing contained in the treaty or protocol shall be construed as authorizing the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, or the United States Section of said Commission, directly or indirectly to alter or control the distribution of water to users within the territorial limits of any of the individual States.

"(d) That 'international dam or reservoir' means a dam or reservoir built across the common boundary between the two countries.

"(e) That the words 'international plants', appearing in article 19, mean only hydroelectric generating plants in connection with dams built across the common boundary between the two countries.

"(f) That the words 'electric current', appearing in article 19, mean hydroelectric power generated at an international plant.

"(g) That by the use of the words 'The jurisdiction of the

Commission shall extend to the limitrophe parts of the Rio Grande (Rio Bravo) and the Colorado River, to the land boundary between the two countries, and to works located upon their common boundary • • • in the first sentence of the fifth paragraph of article 2, is meant: 'The jurisdiction of the Commission shall extend and be limited to the limitrophe parts of the Rio Grande (Rio Bravo) and the Colorado River, to the land boundary between the two countries, and to works located upon their common boundary • • •.'

"(h) The word 'agreements' whenever used in subparagraphs (a), (c), and (d) of article 24 of the treaty shall refer only to agreements entered into pursuant to and subject to the provisions and limitations of treaties in force between the United States of America and the United Mexican States.

"(i) The word 'disputes' in the second paragraph of article 2 shall have reference only to disputes between the Governments of the United States of America and the United Mexican States.

"(j) First, that the one million seven hundred thousand acre-feet specified in subparagraph (b) of article 10 includes and is not addition to the one million five hundred thousand acre-feet, the delivery of which to Mexico is guaranteed in subparagraph (a) of article 10; second, that the one million five hundred thousand acre-feet specified in three places in said subparagraph (b) is identical with the one million five hundred thousand acre-feet specified in said subparagraph (a); third, that any use by Mexico under said subparagraph (b) of quantities of water arriving at the Mexican points of diversion in excess of said one million five hundred thousand acre-feet shall not give rise to any future claim of right by Mexico in excess of said guaranteed quantity of one million five hundred thousand acre-feet of water.

(SENATE RESOLUTION, CONTINUED)

"(k) The United States recognizes a duty to require that the protective structures to be constructed under article 12, paragraph (a), of this treaty, are so constructed, operated, and maintained as to adequately prevent damage to property and lands within the United States from the construction and operation of the diversion structure referred to in said paragraph."

# APPENDIX III

LETTER OF TRANSMITTAL OF TREATY, SECRETARY OF STATE TO THE PRESIDENT. (From Message of the President Transmitting the Treaty to the Senate for Advice and Consent, G. P. O. No. 94318-44-1)

DEPARTMENT OF STATE,
*Washington, February 9, 1944.*

THE PRESIDENT,

*The White House:*

The undersigned, the Secretary of State, has the honor to lay before the President, with a view to its transmission to the Senate to receive the advice and consent of that body to ratification, if his judgment approve thereof, a treaty between the United States of America and the United Mexican States, signed at Washington on February 3, 1944, relating to the utilization of the waters of the Colorado and Tijuana Rivers, and of the Rio Grande (Rio Bravo) from Fort Quitman, Tex., to the Gulf of Mexico.

The treaty consists of a preamble and 7 parts, and contains 28 articles.

Part I, with three articles, contains preliminary provisions. Article 1 defines certain important terms used in the treaty. Article 2 prescribes the general powers and functions of the International Boundary and Water Commission. By the provisions of article 2 the general administration of the treaty is entrusted to the International Boundary Commission organized under the convention of March 1, 1889, between the United States of America and Mexico, the name of the Commission being changed to International Boundary and Water Commission. The Commission is given the status of

an international body, consisting of a United States section and a Mexican section, and it is provided that each Government shall accord diplomatic status to the Commissioner and certain of the other officers of the section of the other Government. Article 2 specifies the Department of State of the United States of America and the Ministry of Foreign Relations of Mexico as the agencies to represent the two Governments in every case wherein action by the Governments is required. Article 3 prescribes an order of preferences for the joint use of international waters.

Part II, consisting of five articles, has particular relation to the Rio Grande (Rio Bravo). Of the waters of this river below Fort Quitman the United States, by article 4, is allotted—

1. All of the waters contributed to the main stream by the measured United States tributaries, chiefly by the Pecos and Devils Rivers.

2. One-half of the flow in the Rio Grande below the lowest major international reservoir so far as this flow is not otherwise specifically allotted by the treaty.

3. One-third of the flow reaching this river from the measured Mexican tributaries above the Alamo River, provided that this one-third shall never be less than 350,000 acre-feet each year as an average in 5-year cycles.

4. One-half of all other flows occurring in the main channel of the Rio Grande.

The quantity thus allotted will not only supply existing uses but also will permit, by an efficient use of the water, considerable expansion of irrigated areas in Texas.

The remaining articles in part II make provision for the con-

struction and operation of international works on the Rio Grande. Of chief importance is the provision, in article 5, for construction, by the two sections of the Commission, of three major international storage dams between the Big Bend and the head of Lower Valley of Texas to provide capacity for water storage, for flood control and for the retention of silt. This article also makes provision for the contsruction of international auxiliary works in the Rio Grande. The cost of storage dams is to be divided in proportion to the conservation capacity allotted to each country, and the cost of other works is to be prorated in proportion to the benefits each country is to receive from each of these works. Articles 6 and 7 authorize the Commission to study, investigate, and prepare plans for flood-control works and for international hydroelectric plants on the Rio Grande. Articles 8 and 9 charge the Commission, subject to the approval of the Governments, with the preparation of rules and regulations for the storage, conveyance, and delivery of the waters of the Rio Grande, including the assignment to each country of capacities in the reservoirs. The Commission also is entrusted with the keeping of records of the waters belonging to each country and of all uses, diversions, and losses of these waters.

(OMITTED HERE ARE THE RESUMES OF PARTS III AND IV OF THE TREATY, DEALING ONLY WITH THE COLORADO AND TIJUANA.)

The nine articles of part V contain provisions of a general nature relating to certain uses of the river channels and of the surfaces of artificial international lakes, to the international works, and to the Commission. By article 20 the two Governments, through their respective sections of the Commission, agree to carry out the construction of works allotted to them. By article 23 the two Governments undertake to acquire all private property necessary for the

construction, maintenance, and operation of the works and to retain, through their respective sections, ownership and jurisdiction, each in its own territory, of all works, appurtenances, and other property required for the carrying out of the treaty provisions regarding the three rivers. However, the jurisdiction of each section of the Commission is definitely restricted to the territory of its own country.

Article 24 entrusts to the Commission certain powers and duties in addition to those specifically provided in the treaty. These powers and duties include the making of investigations and preparation of plans for works and the control thereof; the exercise of jurisdiction by the respective sections over all works; the discharge of the specific powers and duties entrusted to the Commission by this and other treaties; the prevention of any violation of the terms of the treaty; the settlement of all differences that may arise regarding the treaty; the preparation of reports and the making of recommendations to the respective Governments; and the construction, operation, and maintenance of all necessary gaging stations.

It is provided in article 25 that the Commission shall conduct its proceedings in accordance with the rules laid down by articles III and VII of the convention of March 1, 1889. In general, the Commission is to retain all duties, powers, and obligations assigned to it by previous treaties and agreements, so that the present treaty merely augments the Commission's powers, duties, and obligations.

Part VI, having two articles, contains transitory provisions. By article 26 Mexico undertakes, during a period of 8 years from the effective date of the treaty or until the beginning of operation of the lowest major international reservoir on the Rio Grande, to cooperate with the United States to relieve, in times of drought, water

shortages in the Lower Rio Grande Valley of Texas. To this end Mexico, if requested, will release up to a total of 160,000 acre-feet of water during these 8 years from El Azúcar Reservoir on the San Juan River for the use of such lands in Texas, provided that Mexico shall be under no obligation to release for this purpose more than 40,000 acre-feet in any one year. By article 27, during the 5 years before Davis Dam and the Mexican diversion dam are built, the United States will permit Mexico, at its own expense, to build, under proper safeguards, a temporary diversion structure in the Colorado River for the purpose of diverting water into the present Alamo Canal. Futhermore, the United States undertakes to cooperate with Mexico to the end that the Mexican irrigation requirements during this temporary period may be set for the lands under irrigation during 1943, provided that the water needed therefor is not currently required in the United States.

Part VII, consisting solely of article 28, contains the final provisions relating to ratification, entry into force, and termination. It is provided that the treaty shall enter into force on the day of the exchange of ratifications, and that it shall continue in force until terminated by another treaty concluded for that purpose between the two Governments.

Finally, it should be noted that the treaty provides that, in case of drought or serious accident to the hydraulic works in the United States, deliveries of Colorado River water to Mexico will be curtailed in the same proportion as uses in the United States are reduced, and that, if for similar reasons Mexico cannot provide the minimum 350,000 acre-feet from its measured tributaries of the Rio Grande, the deficiency is to be made up from these tributaries during the following 5-year cycle.

Respectfully submitted.

CORDELL HULL.

# APPENDIX IV

EXCERPTS FROM THE TRANSCRIPT, HEARINGS BEFORE THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, 79th CONGRESS, 1st SESSION, ON TREATY RELATING TO UTILIZATION OF WATERS OF CERTAIN RIVERS, 1945 (G. P. O. No. 68368-45, in five parts; letters in parentheses before each excerpt added by counsel for identification)

(a) STATEMENT OF EDWARD R. STETTINIUS, JR., SECRETARY OF STATE, PRESENTED BY JOSEPH C. GREW., UNDER SECRETARY OF STATE.

Mr. Grew. Mr. Chairman and members of the committee, at the request of the Secretary of State I am reading on his behalf the following statement concerning the water treaty.

1. One of the few matters of major importance still pending between the United States and Mexico is the equitable division of the waters of three international rivers — the Rio Grande, the Colorado and the Tijuana. During the first two decades of this century this water problem received the attention of the two Governments on several occasions and was the subject of study by joint commissions. These early efforts having failed, the Congress in 1924 passed an act approving the establishment of an International Water Commission to make a study regarding the equitable use of the waters of the Rio Grande below Fort Quitman, Tex. The refusal of the Government of Mexico to consider the Rio Grande without also considering the Colorado led in 1927 to an amendment of the 1924 act to make it cover all three rivers. The joint commission, organized under the terms of these congressional statutes, made a study of these rivers but was unable to reach an agreement, whereupon in 1932 the Commission was dissolved and the powers of the American

section were transferred to the United States section of the International Boundary Commission.

2. The studies and investigations which formed the basis for the treaty now under consideration by the Senate were authorized by the Congress in the act of August 19, 1935. Since that date the Department of State, in cooperation with Mexican officials, has labored earnestly to bring about a satisfactory solution of this long-standing and troublesome problem. It must be realized that each country owes to the other some obligation with respect to the waters of these international streams, and until this obligation is recognized and defined, there must inevitably be unrest and uncertainty in the communities served by them — a condition which becomes more serious with the increasing burden of an expanding population dependent upon the waters of these streams. Thus it has been in the case of the Rio Grande and the Colorado and Tijuana Rivers. So long has settlement of this problem been delayed that there has come into existence a well-nigh intolerable situation, which the completion of Boulder Dam on the Colorado River early in 1935 has aggravated rather than relieved.

3. On the Colorado, development in the United States and in Mexico has been proceeding at a rapid rate. With an average of over 7,000,000 acre-feet of water now wasting annually through Mexican territory into the Gulf of California, it is of the utmost importance to both nations that there should be an allocation, once and for all, of the waters of this stream, so that, on the one hand, conflicting development and overexpansion, with their attendant disastrous consequences, may be checked and, on the other hand, development may proceed in an orderly and secure manner, free of the uncertainties as to future available water supply which hamper and retard sound growth. Hardship, misunderstanding, and bitter-

ness are the only alternatives to an early and equitable solution of the problem.

4. The treaty now under consideration protects, in large measure, existing uses in Mexico on the Colorado River. In the United States, not only are existing uses protected, but opportunity is given for great expansion. Less than half of the water which will be available to the United States under this treaty is now being beneficially used. On the other hand, I am informed by men skilled in these matters and familiar with all the facts that more than half of the million and a half acre-feet of water allocated to Mexico will be made up, under conditions of ultimate development in the United States, of waste and return flows from lands within the United States.

5. The Department is indebted in very great measure to the Committee of Fourteen and Sixteen of the Colorado River Basin States for its invaluable advice and assistance in working out a statesmanlike solution of the problems of this stream. It seemed to us to be in keeping with our democratic institutions and procedures that the representatives of the communities most vitally concerned should be consulted with respect to these matters, despite the fact that these questions are also of large national and international significance.

6. On the lower Rio Grande, where most of the water supply originates in Mexico, a division of the waters was agreed upon which, when coupled with the building of international dams, will protect existing uses and make possible considerable expansion in both countries. Floods of great magnitude periodically wreak havoc in the communities bordering this stream and flow used into the Gulf of Mexico. An average of almost 4,000,000 acre-feet of water a year is thus wasted in a region where soil and climate com-

bine to make it one of the most fertile in the world, and where, given more adequate irrigation, a great increase in productivity can be expected. The treaty provides for the building of large storage dams to hold the floods in check and almost double the usable water supply. Opportunities for the generation of hydroelectric power will also be jointly exploited, thus contributing to the development of mining and industry in the communities along the Rio Grande.

7. General jurisdiction over the administration of the treaty provisions is vested, subject to the supervision of the two Governments, in the International Boundary Commission, organized under the convention of 1889. This agency has had experience in similar matters in connection with the administration of other treaties. There will be no encroachment, however, on the functions of other Federal agencies, which will continue to control not only matters now under their jurisdiction but also facilities and operations in the United States which are to be used only partly in the fulfillment of treaty provisions. To provide even greater assurance on this point, the two Governments signed on November 14, 1944, a protocol which states in explicit terms the lines of jurisdiction between the Boundary Commission and its respective sections and other Federal agencies in each country.

8. The treaty is the product of long and patient negotiations on the part of both Governments. Every detail received careful consideration by men qualified by training and experience in this particular field, and we may be justly proud of the result. It must be clearly recognized that the mutual obligation of which I have spoken are international in scope, not merely unilateral. I am happy to say that the treaty which the Senate now has under consideration recognizes, defines, and makes provision for meeting these mutual obligations, on all three streams, in a manner fair and equitable to

both countries. To my mind, it is an outstanding example of the settlement of international problems by mutual understanding and friendly negotiation. I cannot overemphasize its importance from the standpoint of international good will, brought about, not by the gift of any natural resource but simply by the application of those principles of comity and equity which should govern the determination of the equitable interests of two neighboring countries in the waters of international streams. I commend it unreservedly to the favorable consideration of the Senate. (pages 19-21)

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TESTIMONY OF L. M. LAWSON, AMERICAN COMMISSIONER, INTERNATIONAL BOUNDARY COMMISSION, U. S. & MEXICO.

(b) Developments on tributaries of the lower Rio Grande have so depleted the natural flow of that river that there is not now sufficient water during low-flow periods to supply established uses in American territory, although millions of acre-feet of floodwaters feasible for storage for beneficial use empty annually into the Gulf of Mexico. Only by agreement between the two Governments can the maximum feasible conservation of these floodwaters and their equitable distribution between the two countries be brought about. Adequate protection of established beneficial uses and further reclamation of arid lands in the lower Rio Grande Valley in the United States are entirely dependent upon such an agreement. (Page 22)

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(c) The pending treaty is not concerned with the Rio Grande above Fort Quitman, Tex. The distribution between the two countries of the waters of that section of the river was determined by

the treaty signed at Washington in 1906. Part of the waters involved, which originate entirely within the United States, had been used to irrigate Mexican lands in the Juarez Valley. Following irrigation developments in New Mexico at the beginning of the century, there was no longer sufficient natural flow to irrigate the said Mexican lands and the Mexican Government presented a claim for damages, thus invoking the principle whereby established beneficial uses of water are deemed entitled to protection against encroachment resulting from upstream diversions. An agreement was reached between the two Governments and embodied in the treaty of 1906, whereby there was allotted to Mexico, annually in perpetuity, after completion of the Elephant Butte storage dam, 60,000 acre-feet of the waters of the Rio Grande above Fort Quitman, Tex., for the purpose of continuing to irrigate Mexican lands in the Juarez Valley previously supplied by such waters.

This same principle was adhered to in determining the equitable distribution between the countries of the international waters of the Rio Grande and Colorado River provided for in the pending treaty, to the distinct advantage of the United States and Mexico. (Page 23)

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(d) . . . Irrigation developments in the United States and the allocation of water to Mexico, under the treaty of 1906, practically account for the entire flow of the (Rio Grande) above Fort Quitman, as regulated at Elephant Butte and Caballo Dams in New Mexico.

The Chairman. I do not want to interrupt you, but right on that point, in order to make this clear to members of the committee who are probably not so familiar with it as some of us are, as I understand it, when we erected this Elephant Butte Dam in New

(COMMITTEE HEARINGS, CONTINUED)

Mexico it had the effect of impounding waters that theretofore had come down the Rio Grande and that had been used by Mexican owners opposite El Paso, in the Juarez Valley, is that correct?

Mr. Lawson. That is right, sir.

The Chairman. In order to compensate those owners and to protect them in the water that they had theretofore used, we made a treaty in 1906, allocating 60,000 acre-feet of waters coming down the Rio Grande to Mexican owners, is that correct?

Mr. Lawson. Yes, sir; and there are a number of points of similarity between that treaty and the one which is now presented for consideration. (Page 24)

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(e) The principal water supply of the Rio Grande below Fort Quitman, Tex., is derived from flood run-off following storms in various areas of the watershed which occur principally from May to September.

About 70 percent of the supply originates in Mexican territory and reaches the river from Mexico's principal tributaries, namely, the Rio Conchos near Presidio, Tex.; the Rio Salado, between Laredo and Roma, Tex.; and the San Juan, below Roma. Developments on the San Juan in Mexico, however, already account for practically all the flow of that river.

About 30 percent of the supply originates in the United States and is contributed principally by the Pecos and the Devils Rivers, both of which flow into the main stream near Del Rio, Tex.

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(COMMITTEE HEARINGS, CONTINUED)

In this length of river, 1,200 miles, below El Paso, there have occurred large, damaging floods, and there have occurred in recent years extreme and prolonged shortages of water; and, in spite of the fact that there are about 500,000 acres irrigated, in the lower valley, and with a rainfall of 24 inches, there is a necessary requirement for the supplementing of this rainfall with irrigation use, because of the fact that the rainfall occurs at the wrong time for the growing season; so that in the semitropical situation we find an area that depends upon the use of international waters for its development, for its continued cultivation, and even for domestic uses. We find that area of 500,000 acres in the three counties of Hidalgo, Cameron, and Willacy dependent upon their use, their diversion of the international waters, with no agreement with Mexico, and confronted with all the symptoms of an uncontrolled river, that requires storage and conservation to protect those continued uses. It is important to carry in mind, too, 70 percent of the contributions come from Mexico; that Mexico has been very diligent in pursuing its development of tributaries. This and some uses in the United States have contributed already to a very serious situation; one, of last summer, where a drought condition prevailed for some weeks, threatening investment and involving even community life through the domestic water supply.

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Although, as I said before, approximately 70 percent of the natural flow of the Rio Grande is supplied by Mexican tributaries, the effect of the pending treaty will be to guarantee to the United States, on the basis of established beneficial uses, approximately one-half of the natural flow, plus about 60 percent of all floodwaters which can be impounded in the contemplated international reservoirs, that is, approximately 2,000,000 acre-feet, less chargeable losses, or sufficient water to make possible the irrigation of

(COMMITTEE HEARINGS, CONTINUED)

about 400,000 acres of land in the United States, in addition to the 500,0000 acres now under irrigation. (Page 25-26)

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(f) The pending treaty is not concerned with the rights which individuals or corporations may have, under the laws of the States of their respective countries, to the use of any portion of the quantities of water thereby definitely allocated to the United States and to Mexico.

Uses of all waters allocated to the United States by the pending treaty are, of course, subject to the jurisdiction of the appropriate authorities of the State concerned, or of a Federal agency, such as the Bureau of Reclamation, when operating an irrigation project in that State. (Page 27)

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(g) TESTIMONY OF FRANK CLAYTON, GENERAL COUNSEL, AMERICAN SECTION OF THE INTERNATIONAL BOUNDARY AND WATER COMMISSION, U. S. AND MEXICO.

Now, how about the diversions and uses from this stream? Here is the provision about that, in Article IX:

*(b) Either of the two countries may, at any point on the main channel of the river from Fort Quitman, Tex., to the Gulf of Mexico, divert and use the water belonging to it and may for this purpose construct any necessary works.*

Either country

*However, no such diversion or use, not existing on the date this treaty enters into force, shall be permitted in either*

*country, nor shall works be constructed for such purpose, until the section of the Commission in whose country the diversion or use is proposed has made a finding that the water necessary for such diversion or use is available from the share of that country* • • •

The effect of this provision is that all existing diversions from the river and uses from the river in both countries are protected under the treaty. If somebody wants to divert some more water from the stream – and we will assume that it is in the United States – the only thing the American section is called upon to do is to determine whether there is impounded in the reservoirs along the Rio Grande, or flowing in the river, enough water to satisfy that use within the share of the United States, a matter of mathematical determination that, under the treaty, has got to be kept up from day to day, week to week, and month to month. But where that diversion is to be and where the use is to be is solely a matter for State authorities under State law. (Page 134)

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EXCERPT FROM WRITTEN STATEMENT FILED BY AMERICAN SECTION, INTERNATIONAL BOUNDARY AND WATER COMMISSION, ANALYZING TREATY.

(h) *Article 9. Uses and diversions of water*

This article permits the use by either country of the river channel to convey water belonging to it, and the diversion of such water wherever desired, and the construction of works for this purpose. With the consent of the Commission, diversions by one country of water belonging to the other is permitted where such water can be replaced at another point on the stream or where it can be

used without any impairment of the rights of the other country, as for the generation of hydroelectric power.

The Commission is required to maintain a system of accounting for all water so diverted or used, and provision is made for the construction, operation, and maintenance of all gaging stations and other mechanical apparatus necessary for this purpose.

It is worthy of note that each section of the Commission, independently of the other, has jurisdiction over the diversion of water for use in its own country, subject, of course, to the availability of such water within that country's allotment. The effect of this is that neither section exercises any control or jurisdiction over uses in the country of the other section. It does not mean, however, that the two sections, either jointly or separately, are vested with any jurisdiction over the use of water within the two countries, except to the extent of determining that water is available within the country's allotment for any such use. Thus, in the case of the United States section, the treaty provisions have no effect upon established water rights under Texas law, except in most cases to furnish added security to these rights by the furnishing of a more adequate and dependable supply. The distribution of the waters within the State would be under the control of the appropriate State agencies or, where Federal projects exist within the State, of the appropriate Federal agencies. The Commission would have supervisory jurisdiction and control over diversion structures across the river, and the American section would have supervisory jurisdiction and control over diversions from the river for use in the United States. All of these diversion works, however, would be located at points where they could serve the areas designated by State authorities, or other appropriate agencies, as being entitled to the use of waters of the Rio Grande, and distribution of the water so diverted

would be within the jurisdiction of those agencies. (Page 166)

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(i) *Article 26. Rio Grande*

The provisions of the treaty relating to the division of the waters of the Rio Grande below Fort Quitman cannot be of much benefit to either country until international storage is provided, and particularly storage at the lowest practicable reservoir site near Salineno, Tex. By the provisions of article 5 the lowest dam is to be constructed within a period of 8 years from the effective date of the streaty. To bridge the gap pending the construction of this dam, Mexico agrees, in article 26, to cooperate with the United States to relieve in times of drought any lack of water needed to irrigate the lands that were under irrigation in the lower Rio Grande Valley in the United States in 1943, by releasing water from El Azucar Reservoir on the San Juan River and allowing that water to run into the Rio Grande for diversion there by the United States. Mexico guaranteed that, if necessary, the water so released will amount, over this entire period, to a total of 160,000 acre-feet and up to 40,000 acre-feet in any one year, subject to certain conditions as to rates of flow. In addition to this guaranteed amount, Mexico will make available during this period and for this purpose, any surplus waters not currently needed in Mexico. The amounts guaranteed are estimated to be sufficient to provide reasonable protection to the irrigation interests in the lower Rio Grande Valley in the United States, based upon the history of past droughts. (Page 176)

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(COMMITTEE HEARINGS, CONTINUED)

(j) MEMORANDUM BRIEF ON TREATY PRECEDENTS REGARDING THE PROTECTION OF EXISTING USES ON INTERNATIONAL STREAMS, FILED BY AMERICAN SECTON, INTERNATIONAL BOUNDARY AND WATER COMMISSION, U. S. AND MEXICO. (Pages 181-191)

1. The Nile Agreement, Great Britain and Egypt, May 4, 1929

This agreement sets up certain principles to govern the use of the waters of the Nile by Egypt and the Sudan. The problem is one of a successive river. Egypt, the lower riparian, has for centuries utilized the waters of the Nile, while the development of the Sudan is of recent origin. The Sudan was reconquered by Great Britain and Egypt jointly in the campaigns of 1896-98, and is today ruled by a condominium. The question of the use of the waters of the Nile is of the utmost importance to the two countries concerned, without which they are nothing but deserts.

The agreement provides that the use of Nile water by the Sudan may enjoy such an increase "as does not infringe Egypt's natural and historical rights in the waters of the Nile and its requirements of agricultural extension." The agreement makes further provision for cooperative measures with regard to the accumulation of hydometric data and limits the Sudan's freedom of action with regard to the construction of works which might affect the flow of the river, as well as extending to Egypt certain privileges within the Sudan. In the Egyptian note the following statements are made:

"It is realized that the development of the Sudan requires a quantity of the Nile water greater than that which has been so far utilized by the Sudan. As your Excellency is aware, the Egyptian Government has always been anxious to encourage such development, and will therefore continue that policy, and be willing to

agree with His Majesty's Government upon such an increase of this quantity as does not infringe Egypt's natural and historical rights in the waters of the Nile and its requirements of agricultural extension, subject to satisfactory assurances as to the safeguarding of Egyptian interests, as detailed in later paragraphs of this note" (par. 2).

"It is further understood that the following arrangements will be observed in respect of irrigation works on the Nile:

"Save with the previous agreement of the Egyptian Government, no irrigation or power works or measures are to be constructed or taken on the River Nile and its branches, or on the lakes from which it flows, so far as all these are in the Sudan or in countries under British administration, which would in such a manner as to entail any prejudice to the interests of Egypt either reduce the quantity of water arriving in Egypt, or modify the date of its arrival, or lower its level" (4, l, i).

From the Nile commission's report attached to the agreement the following extracts are quoted:

"Precedents in this matter of water allocation are rare and practice varied; and the Commission is aware of no generally adopted code or standard practice upon which the settlement of a question of intercommunal water allocation might be based. Moreover, there are in the present case special factors, historical, political, and technical which might render inappropriate too strict an application of principles adopted elsewhere. The Commission, having regard to the previous history of the question, the present position as regards development, and the circumstances attending its own appointment, decided to approach its task with the object of devising a practical

working arrangement which would respect the needs of established irrigation, while permitting such programme of extension as might be feasible under present conditions and those of the near future, without at the same time compromising in any way the possibilities of the more distant future" (par. 21).

"The arrangement contemplated aims at interpreting in definite and technical terms the intentions of the note quoted in the opening paragraph of this report, wherein it was explained that in authorizing extensions of irrigation in the Sudan 'the British Government, however solicitous for the prosperity of the Sudan, have no intention of trespassing upon the natural and historic rights of Egypt in the waters of the Nile, which they recognize today no less than in the past.' The Commission has every hope that its proposals, framed in this spirit, and after full study of the technical aspects of the problem, may form an acceptable basis upon which, by harmonious and cooperative effort, the irrigation development of the future may be founded, and by which all existing rights may be perpetually safeguarded" (par. 22).

"The Commission's main findings may be summarized as follows:

"(i) The natural flow of the river should be reserved for the benefit of Egypt from the 19th January to the 15th July (at Sennar), subject to the pumping in the Sudan as defined below" (Par. 88, i) (British Treaty Series No. 17, 1929, pp. 2, 3, 10, 11, and 29).

The effect of the agreement is to recognize and perpetuate the existing uses in both countries, but to subordinate the interests of the Sudan to those of Egypt as regards future development.

(1) The African World, May 21, 1929.

(2) The Nile Waters Agreement, by Pierre Crabites, Foreign Affairs, volume 8 (1929), No. 1, pages 145-149.

(3) The Economist, May 11, 1929.

(4) The Near East and India, May 16, 1929.

*Other Nile agreements.*

There is group of five treaties and agreements between Great Britain and other powers designed, from the British point of view, to safeguard Egyptian and Sudanese interests in the waters of the Nile.

(1) An exchange of notes between Great Britain and Italy, dated March 24/April 15, 1891, and for the express purpose of "the demarcation of their respective spheres of influence in eastern Africa," contains the engagement of the Italian Government not to construct on the Atbara, for purpose of irrigation, any work which might sensibly modify that river's flow into the Nile (art. III). The Atbara is a tributary of the Nile and flows from its source in the mountains of Ethiopia in a northwesterly direction to its juncture with the Nile just above Berber in the Sudan.

It has three principal tributary streams, all in the mountains of Ethiopia, but Italian ambitions in the nineties made the possibility appear not remote that most of its sources might soon lie within Italian jurisdiction (Hertslet, Commercial Treaties, XIX, 686-688).

(2) Emperor Menelik II, King of Kings, of Ethiopia, agreed in a treaty signed May 15, 1902, with Great Britain, "not to construct, or allow to be constructed, any work across the Blue Nile, Lake Tsana, or the Sobat which would arrest the flow of their waters into the Nile except in agreement with His Britannic Majesty's Govern-

ment and the Government of the Sudan" (art. III).

(3) In a treaty dated May 9, 1906, the Independent State of the Congo (now a Belgian colony) undertook "not to construct, or allow to be constructed, any work on or near the Semliki or Isango River which would diminish the volume of water entering Lake Albert, except in agreement with the Soudanese Government" (art. III) (Hertslet, Map of Africa by Treaty, II, 585).

(4) December 13, 1906, Great Britain, France, and Italy signed an agreement to preserve the integrity of Ethiopia and provided further that they would safeguard "the interests of Great Britain and Egypt in the Nile Basin, more especially as regards the regulation of the waters of that river and its tributaries (due consideration being paid to local interests) * * *" (art. IV (a) (Hertslet, Map of Africa by Treaty, II, 442).

(5) This principle was reaffirmed in an exchange of notes between Great Britain and Italy December 14/20, 1925, wherein it was provided that Italy recognized the prior hydraulic right of Egypt and the Sudan in their headwaters of the Blue and White Nile Rivers and their tributaries, and agreed not to construct, there any works which might sensibly modify their flow. And also that Great Britain and Italy agreed that the existing uses of the inhabitants of the region should be maintained and that they might be extended where necessary to produce food crops for their own sustenance or domestic use or where used for hydraulic power (50 L. N. T. S. 282).

In the Italian note of December 20, 1925, the following statements are made:

"On their side the Italian Government, recognizing the prior

hydraulic rights of Eygpt and the Sudan, engage not to construct on the headwaters of the Blue Nile and the White Nile and their tributaries and affluents any work which might sensibly modify their flow into the main river.

"I note that His Brittanic Majesty's Government have every intention of restricting the existing water rights of the population of the neighboring territories which enter into the sphere of exclusive outline and economic influence. It is understood that, insofar as is possible and is compatible with the paramount interests of Egypt and the Sudan, the scheme in contemplation should be so framed and executed as to afford appropriate satisfaction to the economic need of these populations."

It is evident that the result of all those agreements is to protect the existing uses in both upper and lower riparian countries, but it is also very limiting on the possible extension of the use in the upper countries.

### 2. The Kunene River, Union of South Africa and Portugal, July 1, 1926

From "time immemorial" the flood waters of the Kunene River were accustomed to overflow their banks in certain portions of what is now Portuguese territory (Angola) and were conducted along natural channels into territory now under the mandate of the Union of South Africa, where the lands and pastures were irrigated thereby and the ground water replenished. Eventually the inlets of these flood channels became choked with silt so that the extent and benefits of the periodic inundations were greatly reduced.

The Kunene is a boundary stream for about 250 miles from the

Atlantic coast eastward and upstream to the top of the Rua Kana Falls. At this point the river enters Portuguese territory and turns northward passing the Kazambu Rapids and the place called Naulila and thence on in a northerly direction to its headwaters which lie in Portuguese Angola.

The flood channels, mentioned above, leave the east bank of the river above Naulila and also between Naulila and Kazambu Rapids and extend southward into Ovanboland, which is a territory mandated to the Government of the Union of South Africa.

In the treaty, Portugal for "reasons of humanity" concedes to South Africa the right to use up to one-half of the floodwater of the Kunene River for irrigation and inundation of the mandated territory provided the project proves feasible (art. 6). For this purpose South Africa may construct and maintain works within Portuguese territory (art. 8). An international joint technical commission is to report on the feasibility of diverting the water of the Kunene River. No hydraulic works except those specified in the treaty may be constructed by either Government on boundary streams (Kunene and Okavango) without the consent of the other Government.

With regard to the development of hydraulic power, the Government of Portugal agreed that, whereas it was not feasible for economic reasons to construct all the works necessary for the development of hydraulic power within the mandated territory (Union of South Africa), that a dam might be constructed within Portuguese territory, not more than 3 kilometers within the boundary (art. I), by either Government (art. II). The dam might be constructed unilaterally or cooperatively, but "notwithstanding the right which each Government has to one-half share of the water, the Government which constructs the dam, weir, or barrage shall be entitled to the use of all the water, until such time as the other

Government shares in the scheme. But the Government entitled to the use of all the water may, under contract, give a share of the power to the other Government."

The maintenance of the dam was to be unilateral, if so constructed; joint maintenance ,if jointly constructed. But if unilaterally constructed and later shared by the other Government, maintenance would then become joint (art. III).

(Treaty Series No. 30 (1926).)

### 3. The River Gash, United Kingdom and Italy, June 12-15, 1925

The river Gash flows westward and northward from Italian Eritria into the Anglo-Egyptian Sudan where its unused waters become lost in the sands of the desert. It is a successive river. There are regions along the banks of the Gash in both Eritria and the Sudan of great fertility, but entirely dependent on the river for any productive agricultural development. Very little development had taken place in Eritria prior to this agreement. In the Sudan about 15,000 acres were under irrigation with waters from the Gash and, in addition, the floodwaters of the river served for flooding the areas used for wells, for grazing, and also for the cultivation of food crops by the natives. In Eritria the plain of Tessenei would require 65,000,000 cubic meters of water for the full development of its irrigable area of 20,000 hectares.

The agreement provides for the equal division of the waters of the Gash up to 130,000,000 cubic meters. The Sudan Government will pay for all waters used in excess of 65,000,000 cubic meters 20 percent of the sum received by it in respect of cultivation

by irrigation of land in the Gash Delta in excess of a fixed sum of L50,000 annually. The Eritrian Government is to let pass all waters in excess of 65,000,000 cubic meters annually. This agreement results in the perpetuation of existing uses in both countries as well as making provision for their future extension. The experts' report attached to the agreement provides in part as follows:

"Since it would not be for the practical advantage of either territory to divide the very small supplies, we would leave the first 5 cubic meters per second at the complete disposal of Tessenei. The division of the supply from 5 up to 20 cubic meters per second should be made in such proportionately progressive manner that when 20 cubic meters per second is reached, the partition will be 10 cubic meters per second to each.

"The discharge above 20 cubic meters per second should be divided in equal parts until the discharge required for the irrigation of the plain of Tessenei is reached. Above that, the water will be passed freely below the barrage."

(Treaty Series No. 33 (1925).)

### 4. The River Juba, Great Britain and Italy, December 24, 1915

When this treaty was entered into by Great Britain and Italy, the Juba was the boundary between Italian Somaliland and Kenya Colony. Since the World War, Great Britain has permitted Italy to move the Somaliland boundary farther south, with the result that the Juba today is no longer an international stream as between Kenya and Italian Somaliland. But for a period of several years the use of the waters of the Juba was subject to the provisions of this

treaty. The region involved was relatively undeveloped, but dependent on irrigation for any and all crops.

The treaty provides for a permanent mixed commission to give effect to the agreements for the administration of the Juba and to study and present further regulations for the consideration of the two governments. Existing irrigation and other uses of the water to be registered with the commission and protected. Hydrographic records to be kept and both governments to promulgate identic laws and regulations governing diversions of water from the river. Provision is made for the acquisition of new rights to users of water through local and commission authority. Any applications of large new diversions to be carefully studied as to their effect on navigation. The treaty contains, as well, regulations for customs transit across the river, conservation of the river's channel, and for navigation.

Annex IV of the treaty provides:

> The system of irrigation with ditches actually used by the natives on either bank of the stream should be maintained subject to the adequate protection of the river banks and waterhead works, which should be enforced without unnecessary severity toward the natives" (art. III).

And that:

> The watering places of the Somalis are to be numbered and registered and the rights of the Somalis protected (art. IV).

And that:

> It is advisable that irrigation works on a large scale should not be sanctioned without a careful investigation by the permanent commission, seeing that they are liable to curtail the annual period during which the river is navigable.

(Official Gazette of the East African Protectorate, June 7, 1916.)

5. Tigris and Euphrates: Upper Jordan and Yarmuk, Great Britain and France, December 23, 1920

This treaty, which is a general boundary convention, contains the provision that the British and French Governments will nominate an international commission to study any plan of irrigation contemplated in the French mandated territory (upper riparian), the execution of which would diminish in any considerable degree the waters of the Tigris and Euphrates at the point where they enter Mesopotamia (lower riparian) (art. 3). The dependence of all agriculture in Mesopotamia on irrigation from the Tigris and Euphrates is a matter of common knowledge. There is accordingly implied here the principle that the development of any new uses in the upper riparian state must take full cognizance of preexisting established uses in the lower.

The treaty further provides that experts nominated by the administrations of Syria and Palestine will study the question of the employment of the waters of the upper Jordan and Yarmuk and of their tributaries for the purposes of irrigation and the development of hydroelectric power. In this connection two principles are set up. The first establishes "the needs of the territories under the French mandate" (in part upper riparian and in part continguous) as receiving prior satisfaction. Secondly the French Government is to give its representatives "the most liberal instructions for the employment of the surplus of these waters for the benefit of Palestine" (in part lower riparian and in part contiguous) (art. 8).

(Nouveau Recueil General des Traites, 3me serie XII, 582.)

### 6. Lakes Huleh and Tiberias and the Jordan River, Great Britain and France, February 3, 1922

This agreement, which was the outcome of the investigation authorized by the two Governments (December 23, 1920) on the upper Jordan and Yarmuk, makes provision for the construction of a dam by the Government of Palestine to raise the level of the lakes Huleh and Tiberias, (the second of which is international. The principle of the priority of uses in the French mandated territory (in part upper riparian and in part contiguous) is reaffirmed in the following terms: "Any existing rights over the use of the waters of the Jordan by the inhabitants of Syria shall be maintained unimpaired."

(Martens, Nouveau Recueil General des Traites, 3me serie, XVII, 213.)

### 7. Rio Grande Above Fort Quitman, United States and Mexico, May 21, 1906

This is a case of a river, entirely within the territory of one State, which at a certain point becomes a boundary stream. The agreement provides for the equitable distribution of the waters of the river from the point where it becomes an international boundary downstream for a river distance of about 150 miles.

In 1906, by a convention, the United States Government agreed to deliver to Mexico for use in the Juarez Valley, extending from El Paso to Fort Quitman, Tex., 60,000 acre-feet of water per year, which it was estimated would be sufficient to irrigate all of the lands that previously had been irrigated by Mexico in that valley, and the Mexican Government waived any and all claims to the waters

of the Rio Grande for any purpose whatever above Fort Quitman.

The waters thus supplied for use in Mexico originates in the United States and is controlled by the Elephant Butte Dam, which was built and is maintained and operated entirely at the expense of the United States. The Mexicans of the Juarez Valley are thus protected in benefits of Rio Grande water to the full extent to which these were enjoyed before upstream diversions and control works interferred with the flow of the river past their lands. But the use of Rio Grande waters in Mexico above Fort Quitman is definitely limited to 60,000 acre-feet per year, there being no provisions by which increased diversions may be made.

The material portions of the treaty are as follows:

*"Article I*

"After the completion of the proposed storage dam near Engle, New Mexico, and the distributing system auxiliary thereto, and as soon as water shall be available in said system for the purpose, the United States shall deliver to Mexico a total of 60,000 acre-feet of water annually, in the bed of the Rio Grande at the point where the head works of the Acequia Madre, known as the Old Mexican Canal, now exist above the city of Juarez, Mexico.

*"Article II*

"The delivery of the said amount of water shall be assured by the United States and shall be distributed through the year in the same proportions as the water supply proposed to be furnished from the said irrigation system to lands in the United States in the vicin-

ity of El Paso, Texas, according to the following schedule, as nearly as may be possible: (Here follows the schedule).

"In case, however, of extraordinary drought or serious accident to the irrigation system in the United States, the amount delivered to the Mexican Canal shall be diminished in the same proportion as the water delivered to lands under said irrigation system in the United States.

*"Article III*

"The said delivery shall be made without cost to Mexico, and the United States agrees to pay the whole cost of storing the said quantity of water to be delivered to Mexico, of conveying the same to the international line, of measuring the said water, and of delivering it in the river bed above the head of the Mexican Canal. It is understood that the United States assumes no obligation beyond the delivering of the water in the bed of the river above the head of the Mexican Canal.

*"Article IV*

"The delivery of water as herein provided is not to be construed as a recognition by the United States of any claim on the part of Mexico to the said waters; and it is agreed that in consideration of such delivery of water, Mexico waives any and all claims to the waters of the Rio Grande for any purpose whatever between the head of the present Mexican Canal and Fort Quitman, Texas, and also declares fully settled and disposed of, and hereby waives, all claims heretofore asserted or existing, or that may hereafter arise, or be asserted, against the United States on account of any damages

alleged to have been sustained by the owners of land in Mexico, by reason of the diversion by citizens of the United States of waters of the Rio Grande.

*"Article V*

"The United States, in entering into this treaty, does not thereby concede, expressly or by implication, any legal basis for any claims heretofore asserted or which may be hereafter asserted by reason of any losses incurred by the owners of land in Mexico due or alleged to be due to the diversion of the waters of the Rio Grande within the United States; nor does the United States in any way concede the establishment of any general principle or precedent by the concluding of this treaty. The understanding of both parties is that the arrangement contemplated by this treaty extends only to the portion of the Rio Grande which forms the international boundary, from the head of the Mexican Canal down to Fort Quitman, Texas, and in no other case."

(39 Stat. 2953; Treaty Series No. 455, Malloy Treaties, I, 1202.)

### 8. Milk and St. Mary Rivers, United States and Great Britain, January 11, 1909

The comprehensive waterways convention between the United States and Canada of 1909 provided that each country had complete control of all water arising on and flowing from its territory into the other or into boundary waters. But uses of such waters already existing were recognized and ratified (art. II).

With respect to the Milk and St. Mary, two successive rivers, the convention provides that they are to be treated as one stream

for the purposes of irrigation and power, and that the waters thereof shall be apportioned equally between the two countries (art. IV). The effect of this division was to adequately protect all uses existing at the time the convention was signed. Canada furnishes about one-fifth of the water of these two rivers, both of which originate within United States territory, but the equal division of the waters was probably a quid pro quo for the concession made to the United States of the right to carry water, diverted from the St. Mary into the Milk, along the 130 miles the Milk River travels within Canadian territory before recrossing the boundary back into the United States.

In a general provision with regard to boundary waters (art. VIII), as opposed to waters of successive streams, it was agreed that each country had equal right in the use of such waters. There was set up an order of precedence with regard to new uses, which might be developed under agreement of the two countries, as follows: (1) Domestic and sanitary purposes; (2) uses for navigation, including the service of canals for the purposes of navigation; (3) uses for power and for irrigation purposes. But the foregoing provisions were not to apply to or disturb any existing uses of boundary waters on either side of the boundary.

Articles II, VI, and VIII of this treaty read as follows:

*"Article II*

"Each of the High Contracting Parties reserves to itself or to the several State Governments on the one side and the Dominion or Provincial Governments on the other as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line

which in their natural channels would flow across the boundary or into boundary waters; but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing or to cases expressly covered by special agreement between the parties hereto.

"It is understood, however, that neither of the High Contracting Parties intends by the foregoing provision to surrender any right, which it may have, to object to any interference with or diversions of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary.

"*Article VI*

"The High Contracting Parties agree that the St. Mary and Milk Rivers and their tributaries (in the State of Montana and the Provinces of Alberta and Saskatchewan) are to be treated as one stream for the purposes of irrigation and power, and the waters thereof shall be apportioned equally between the two countries, but in making such equal apportionment more than half may be taken from one river and less than half from the other by either country so as to afford a more beneficial use to each. It is further agreed that in the division of such waters during the irrigation season, between the 1st of April and 31st of October, inclusive, annually, the United States is entitled to a prior appropriation of 500 cubic feet per second of the waters of the Milk River, or so much of such amount as constitutes three-fourths of its natural flow, and that Canada is

entitled to a prior appropriation of 500 cubic feet per second of the flow of St. Mary River, or so much of such amount as constitutes three-fourths of its natural flow.

"The channel of the Milk River in Canada may be used at the convenience of the United States for the conveyance, while passing through Canadian territory, of waters diverted from the St. Mary River. The Provisions of Article II of this treaty shall apply to any injury resulting to property in Canada from the conveyance of such waters through the Milk River.

"The measurement and apportionment of the water to be used by each country shall from time to time be made jointly by the properly constituted reclamation officers of the United States and the properly constituted irrigation officers of His Majesty under the direction of the International Joint Commission.

*"Article VIII*

"This International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III and IV of this treaty the approval of this Commission is required, and in passing upon such cases the Commission shall be governed by the following rule or principles which are adopted by the High Contracting Parties for this purpose:

"The High Contracting Parties shall have, each on its own side of the boundary, equal and similar rights in the use of the waters hereinbefore defined as boundary waters.

"The following order of precedence shall be observed among

the various uses enumerated hereinafter for these waters, and no use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in this order of precedence: (1) Uses for domestic and sanitary purposes; (2) uses for navigation, including the service of canals for the purposes of navigation; (3) uses for power and for irrigation purposes.

"The foregoing provisions shall not apply to or disturb any existing uses of boundary waters on either side of the boundary.

"The requirement for an equal division may in the discretion of the Commission be suspended in cases of temporary diversions along boundary waters at points where such equal division cannot be made advantageously on account of local conditions, and where such diversion does not diminish elsewhere the amount available for use on the other side.

"The Commission in its discretion may make its approval in any case conditional upon the construction of remedial or protective works to compensate so far as possible for the particular use or diversion proposed, and in such cases may require that suitable and adequate provision, approved by the Commission, be made for the protection and indemnity against injury of any interests on either side of the boundary.

"In cases involving the elevation of the natural level of waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by

it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby.

"The majority of the Commissioners shall have power to render a decision. In case the Commission is evenly divided upon any question or matter presented to it for decision, separate reports shall be made by the Commissioners on each side to their own Government. The High Contracting Parties shall thereupon endeavor to agree upon an adjustment of the question or matter of difference, and if an agreement is reached between them, it shall be reduced to writing in the form of a protocol, and shall be communicated to the Commissioners, who shall take such further proceedings as may be necessary to carry out such agreement."

The general provisions applying to all uses of boundary waters on the Canadian frontier are equally applicable to uses for hydraulic power. One article, however, deals exclusively with the hydroelectric power plants on the Niagara River (art. V). It was here the purpose of the High Contracting Parties to limit the diversions from the Niagara River so that the level of Lake Erie and the flow of the stream might not be appreciably affected. In the accomplishment of this object it was the expressed desire of the two countries to cause the least possible injury to investments which had already been made in the construction of power plants, under proper authority, on both sides of the river. It was accordingly provided that daily diversions of water of the Niagara River on the United States side for power purposes should be limited to 20,000 cubic feet per second, while on the Canadian side the limit was set at 36,000 cubic feet of water per second.

This original division of the waters of a boundary stream for power purposes was apparently based on no other consideration

than that of the extent of the diversions that had been licensed and undertaken in each State at the time of the signing of the treaty.

(36 Stat. 2448; Treaty Series No. 548.)

## 9. The Tartaro River

We have a record of the distribution of the waters of this river extending over a period of 224 years. Today the Tartaro is entirely within the jurisdiction of Italy, but before the unification of that country it was partially in Venice and partially in Mantua. It is difficult to ascertain to what extent the Tartaro was a boundary stream and to what extent it was of a successive nature, but that its water were used for the cultivation of rice in both sides is a well-established fact.

The seven treaties covering the use of the waters of the Tartaro during these years are of the following dates: March 15, 1549; November 16, 1599; April 20, 1752; June 9, 1753; June 25, 1765; November 1, 1764; and June 19, 1765.

The treaty of 1549 appears to have been an international substantiation of the titles to water previously granted to their subjects by the two states concerned and contains provisions regulating the nature and operation of the various private diversion structures along the river, all for the avowed purpose of removing disputes. The treaty of 1599 sought to secure the actual execution of capitulations concluded in 1548 as well as the removal of "such innovations as may have been made since the said capitulations to the detriment and injury of the common subjects" by the appointment of commissioners.

In the middle of the eighteenth century, controversies among

the water users along the Tartaro became again acute and a new treaty was undertaken (April 20, 1752). It was found that the conditions of things had changed and that "the quantity of the aforesaid waters was considerably less than that granted at various times to the respective subjects and substantiated in their titles." A committee of experts under orders of the commission prepared a report on the practicable means of increasing the waters of the Tartaro and preventing accidental or arbitrary diversions, so as to obtain a large volume for equitable assignments to the use of each party. The number of rice fields that were to be irrigated with the waters of the Tartaro was set by the experts at 6,040 and a proportional distribution was made to the various riparian owners (art. I), based apparently on their historic titles as recorded in the earlier treaties. It was then provided that the titles belonging to both the Veronese and Mantuans should be understood as permanent and invariably reduced by law and general rule to the respective total of uses as set forth in the distribution (art. II). No further concessions were to be made of the waters of the Tartaro and its affluents (art. III); further provisions dealt with the construction of works, rectification of portions of the stream, and regulation of the use of the water.

The later treaties contained slight modifications of the provisions of the treaty of 1752 as to diversion structures, provisions for their regular inspection, and regulations for the improvement and maintenance of the channel of the Tartaro and its tributaries.

The seven treaties on the Tartaro are quite voluminous and make up a large file but the very local nature of their provisions together with the lack of information with regard to their political background, renders the deduction of general principles from their provisions both difficult and questionable, other than that the

international settlement of the division of these waters was apparently based primarily on consideration of private title.

### 10. Boundary Stream, France and Spain, May 26, 1866, and July 11, 1868

There are a number of irrigated areas in the Pyrennes in both France and Spain. The boundary treaty of 1866 between these two countries sought to set up a regime for the enjoyment of such boundary waters as were used by citizens of both countries.

On both successive and contiguous streams each Government recognized, subject to a joint vertification, the legality of irrigations, factories, and usufructs for domestic uses then existing in the other state, by virtue of concession, title, or prescription, with the reservation that only the water necessary to satisfy real needs should be used, that abuses were to be suppressed, and that such recognition should not affect the respective rights of the Governments to authorize works of public utility on condition of legitimate indemnities (art. IX). If having satisfied the real needs of the uses respectively recognized by both parties as regular, some water remained available at low water crossing the frontier, it was to be divided in advance between the two countries in proportion to the extent of irrigable land belonging to the respective immediate riparian owners, deducting the lands already irrigated (art. X).

Articles IX and X read as follows:

*"Article IX*

"For streams which pass from one country to the other or which serve as frontier, each Government recognizes, subject to making a

joint vertification, when it shall be useful, the legality of irrigations, factories and usufructs for domestic uses now existing in the other States, by virture of concession, title or by prescription, with the reservation that only the water necessary to satisfy real needs shall be used, that abuses must be suppressed, and that such recognition shall not affect the respective rights of the Governments to authorize works of public utility on condition of legitimate indemnities.

*"Article X*

"If, after having satisfied the real needs of the uses respectively recognized by both parties as regular, some water remains available at low water in crossing the frontier, it shall be divided in advance between the two countries in proportion to the extent of irrigable land belong ing to the respective immediate riparian owners, deducting the lands already irrigated."

An international commission of engineers was to be set up to carry out hydrographic studies and to carry out the construction of certain works, as well as general duties of inspection along the streams. (Art. XVIII).

The final act of July 11, 1868, carries the results of the engineers' preliminary work and contains the specific regime of the boundary streams to be followed, described in minute detail. All important diversions and diversion structures on the several rivers are described and regulated. Provision is made for obtaining strict observance of all regulations and the cooperation of authorities on both sides of the boundary.

(Hertslet, III, 1647; British and Foreign State Papers, LVI, 212, et seq. British and Foreign State Papers, LIX, 454 et seq.)

## 11. River Roya and Affluents, France and Italy, December 17, 1914

The Roya and its affluents cross and recross the Franco-Italian frontier and at certain places form the international boundary. A treaty with regard to the utilization of the waters of this river provides that future hydropower projects in one country must not perceptibly change the regime of the Roya or its tributaries as it passes into the other country (art. I).

Where a stream forms the boundary line between the countries, each is acknowledged to have equal rights to the hydropower of the stream and each agrees not to use this right so as to prevent the other from a similar use, without previous consent of the other (art II). To facilitate the best use of the power of the main river, where it forms the boundary, the two countries agree to leave the entire use of the water, to the French bank of the stream, between certain points, and the entire use, to the Italian bank, between certain other points.

An international commission is to administer the agreement in a limited way (art. II).

The following boundary treaties, in addition to those outlined above, contain a provision at the place indicated, providing for, or clearly implying, the recognition of consumptive uses of international waters existing at the time the agreement was undertaken. Some clearly involve waters for domestic and sanitary purposes only, while others make specific mention of uses for irrigation and power. An accurate evaluation of the relative significance of such treaties would require the accumulation of physical data with reference to each individual case. It is generally true, however, that

the absence of provisions describing set quantities of water may rightly lead one to the conclusion that the quanties involved are not usually great.

1. Austria and Russia, May 3, 1815, art. 23, Hertslet, I, 100.

2. Prussia and Russia, May 3, 1815, art. 21, Ibid., I, 111.

3. Sardinia, Swiss Confederation, Geneva, March 16, 1816, art. 15, Hertslet, I, 430.

4. Galicia (Austrian Empire) and Russia, July 10, 1829, art. 4, Neumann's Comp. of A. T., IV, 258.

5. Prussia and Russia, March 4, 1835, art. 49, B. F. S. P., XXIII, 293.

6. Belgium and Luxemburg, August 8, 1843, art. 30, Recueil de Traites, Belgium, I, 344-46.

7. Netherlands and Belgium, August 8, 1843, art. 36, B. S. E. P., XXXV, 1202.

8. Luca, Modena, Tuscany, Austria and Sardinia, November 28, 1844, art. 4, Hertslet, II, 1051.

9. Bohemia and Saxony, October 12, 1846, art. 6, Neumann, V, 56-60.

10. Spain and Portugal, September 29, 1862, art. 26, B. F. S. P., LXII, 941.

11. Spain and Portugal, November 4, 1866, Trans. art., Ibid., LXII, 952.

12. Sweden and Norway, October 26, 1905, art. 1, Ibid., XCVIII.

13. Allies and Germany, June 28, 1919, art. 258, Malloy, III, 3329.

14. Allies and Austria, September 10, 1919, art. 309, Malloy, III, 3149.

15. Allies and Hungary, June 4, 1920, art. 292, Malloy, III, 3539.

16. Allies and Turkey, August 10, 1920, art. 363, Malloy, III.

17. Denmark and Germany, April 10, 1922, art. 17, L. N. T. S. No. 274.

18. Germany and Poland, May 15, 1922, art. 344, B. F. S. P., CXVIII, 367.

19. Hungary and Rumania, April 14, 1924, arts. 2 and 3, L. N. T. S. No. 113.

20. France and Germany, August 14, 1925, arts. 13 and 14, 75 L. N. T. S., 264.

21. Germany and Poland, August 19, 1926, art. 2, L. N. T. S.

22. France and Saar, November 13, 1926, art. 20, 77 L. N. T. S. 238.

23. Germany and Saar, November 13, 1926, art. 2, 77 L. N. T. S., 242.

24. Germany and Poland, February 16, 1927, art. 4, 71 L. N. T. S., 381.

25. Germany and Lithuania, January 29, 1928, art. 15, L. N. T. S. No. 2027.

26. Hungary and Czechoslovakia, November 14, 1928, arts. 17, 25, 110 L. N. T. S., 427.

(COMMITTEE HEARINGS, CONTINUED)

27. Great Britain and France: Notes as to Gold Coast and Sudan, March 18/April 25, 1904, art. 3, Hertslet, Africa, II, 822, 23, 26.

28. Great Britain and France: Notes as to Gold Coast and Ivory Coast, May 11/15, 1905, art. 4, Hertslet, Africa, II, 832, 41.

29. Great Britain and France: Notes as to Southern Nigeria and Dahomey, October 19, 1906, art. 3, Ibid., II, 849, 50, 61.

30. Argentina and Uruguay, January 5, 1910, art. 3, Martens, 3me serie, VI, 876. (Pages 181-191)

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(k) EXCERPT FROM STATEMENT FILED BY AMERICAN SECTION, INTERNATIONAL BOUNDARY AND WATER COMMISSION, U. S. AND MEXICO, RELATING TO THEIR FUNCTIONS UNDER TREATY.

IV. *Functions to be performed directly by the United States section of the Commission.*

1. Arrange with the appropriate agencies of the Department of the Interior of the United States—

(a) To be informed in advance regarding planned releases of Colorado River water during each ensuing year, in order to determine the quantity which Mexico is entitled to schedule.

(b) To be informed regarding necessary reductions in deliveries of Colorado River water to projects in the United States, in order that deliveries of water allocated to Mexico may be proportionately reduced.

(c) To obtain releases of water at Davis Dam, when placed in

operation, necessary to make deliveries of water allocated to Mexico in accordance with schedules.

2. Construct, operate, and maintain gaging stations, on or along the border, in the United States necessary to measure deliveries to Mexico from Colorado River and United States contributions and diversions on the Rio Grande, and arrange with appropriate agencies to obtain other data as they may be required.

3. Determine, with respect to application for future diversions of Rio Grande water to American territory, whether or not there is available sufficient water belonging to the United States for such diversion. (Page 220)

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(1) EXCERPT FROM REPORT OF THE "COMMITTEE OF SEVEN," AN ATTORNEYS COMMITTEE, REPRESENTING INTERESTED STATES.

2. Question: "In the exercise of the treaty-making power, what are the applicable principles of international law?"

We answer: (a) Principles of equity and comity are determinative of allocation of the water of an international river (b) so far as we can ascertain there is no body of international law which controls the problem, in the sense of judicial decisions handed down by a tribunal whose decisions are binding upon nations (c) in the exercise of the treaty-making power, precedents indicate that considerations of the preservation of existing uses of an international stream are given due weight in the light of pertinent physical facts and in some cases opportunity for future development are recog-

nized. These uses are normally fixed as of the time the treaty is made. However, physical conditions and improvements on the river should be considered in fixing the time as to which the recognition of beneficial uses should be made.

An illustration of the treaty-making convention is the Rio Grande Convention between the United States and Mexico, dated May 21, 1906, relating to the equitable division of the waters of the Rio Grande above Fort Quitman. After debate between the two Governments as to the existence of any legal right on the part of Mexico, the United States determined to accord to Mexico, on grounds of equity and comity, 60,000 acre-feet of water per annum. The treaty was made in contemplation of the construction of Elephant Butte Dam in New Mexico, and was designed to afford to Mexico water to irrigate all the lands in the Juarez Valley which had been beneficially using Rio Grande water for hundreds of years. The Mexican Government accepted these terms and waived all rights to the waters of the upper Rio Grande beyond the agreed amount. Thus the existing Mexican uses originally served from natural flow of the stream were protected and the United States is entitled to use all other water conserved by the dam. Page 628)

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TESTIMONY OF GROVER SELLERS, ATTORNEY GENERAL OF TEXAS

(m) Under articles 5 and 9 of the treaty, the existing diversions and uses along the Rio Grande in both countries are fully protected. As to future diversions, the American section is limited to a determination that water within the share of the United States is available at the time and place of the proposed new diversion

with which to supply it. It should be noted that this determination as to American diversions is to be made by the American section, not by the Commission. Since articles 8 and 9 require the Commission and the two sections to keep accurate records of the quantities of waters in the reservoirs and flows in the main stream within the allocated share of each country, this determination by the American Commissioner is purely factual and ministerial. No discretion is vested in him as to such determination. Where the water is to be used and at what times and in what quantities, as well as all titles to realty on the American side, are entirely matters for the determination of the duly constituted authorities of the State of Texas under the provisions of State law. The effect of the treaty, however, will be to give added value to water rights along the Rio Grande in Texas, because it will afford an adequate supply of water upon which these rights can operate. There is nothing in the entire treaty even suggestive of any right or power in the Commission or either of its sections to pass upon the validity or respective priorities of private rights. Those matters will continue to be determined by the State law. (Page 1247)

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(n) Some objection has been voiced to the treaty on the ground that it applies in perpetuity. In my opinion, that is one of the greatest merits of the treaty. It forever guarantees existing uses, and defines the water rights of each country so that investors on both sides of the border may proceed to make improvements up to the maximum water available. (Page 1248)

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(o) In conclusion allow me to say that it will be pointed out

(COMMITTEE HEARINGS, CONTINUED)

by other witnesses that existing uses in the lower Rio Grande Valley of Texas are in immediate jeopardy because of developments in Mexico. This treaty is an absolute necessity with us for the protection of what we already have. In providing for the impounding of floodwaters, however, it goes beyond the protection of existing uses and permits a large expansion in an area of the United States of great significance to our domestic economy. (Page 1249)

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(p) Senator Downey. General, the evidence seems to indicate that while Mexico contributes much more than one-half of the water, substantially, than the waters that are affected by this treaty, Texas comes out with much more than half of the total water?

Mr. Sellers. That is right.

Senator Downey. That is all.

Mr. Sellers. That is due to the prior development on the Texas side. That rule is applied in dividing our waters.

Senator Hatch. That is just the point I was going to ask you about. The Government of Mexico has recognized the established rule of irrigation States in the United States of appropriation and application to beneficial use?

Mr. Sellers. That is my understanding. The theory upon which the treaty was negotiated recognized – specifically recognized – prior use and guaranteed it, as I understand it, at least down in our country. (Page 1258)

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(COMMITTEE HEARINGS, CONTINUED)

EXCERPTS, DIGEST OF TESTIMONY OF DEPARTMENT OF STATE OFFICERS FILED WITH COMMITTEE BY SENATOR CONNALLY.

(q) With respect to this allocation of Colorado River water to Mexico, certain observations should be made. In the first place, the allocation is justifiable under the views expressed by a number of recognized authorities on international law, and is in accord with the practice of States as evidenced by several treaties making equitable apportionment of waters between upper and lower riparian States. The doctrine of equitable apportionment has, of course, been applied by the Supreme Court of the United States in controversies between States of the Union. There appear to be no decisions of international tribunals dealing with the problem.

In the appendix attached to the statement by the American section of the International Boundary Commission, relating to the pending treaty, there will be found a resume of the principal water treaties among the various nations, an analysis of which will disclose that these treaties are based primarily upon the recognition of existing uses, with provision in most cases for expansion in both the upper and lower States, within the limits of the available water supply.

The United States is a party to two of these treaties. These are the convention of May 21, 1906, between the United States and Mexico, allocating the waters of the Rio Grande above Fort Quitman, and the comprehensive waterways treaty between the United States and Great Britain of January 11, 1909. In the former there were allotted to Mexico 60,000 acre-feet of water per year in perpetuity, which was estimated to be the maximum quantity that had ever been previously used by Mexico in the Rio Grande Valley

above Fort Quitman, thus recognizing existing uses at the time the convention was negotiated. Under this convention the United States has proceeded with its development, free from any uncertainty which would have resulted from a failure to fix and determine the Mexican right. The treaty of 1909 with Great Britain recognized already existing uses of the waters of the international streams and, with respect to the Milk and the St. Mary's Rivers, divided the waters of these two streams equally between the two countries. The effect of this division was to protect all uses existing at the time the treaty was signed.

The criterion in all the treaties apparently was maximum uses existing at the time of, or prior to, the negotiation of the treaty. (Page 1804)

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(r) 3. Similarities Between The Pending Treaty With Respect To The Colorado River And Water Convention With Mexico of 1906.

There is a remarkable parallel between those provisions of the pending water treaty which relate to the delivery of Colorado River water to Mexico and the provisions of the convention of 1906 with Mexico for the equitable distribution of the waters of the Rio Grande above Fort Quitman, Tex. The physical situation is roughly parallel. Both rivers rise within the United States and the waters allocated to Mexico both from the Rio Grande above Fort Quitman under the treaty of 1906 and from the Colorado River under the pending treaty, originate wholly within the United States. The convention of 1906 allocated to Mexico for use in the Juarez Valley above Fort Quitman, Tex., 60,000 acre-feet of water per year in

perpetuity, this being the amount which it was estimated would be sufficient to irrigate all of the lands in that valley that previously had been irrigated by Mexico. The pending water treaty allocates to Mexico 1,500,000 acre-feet of Colorado River water per year, whereas, at the time the treaty was negotiated in 1943, Mexico was using in excess of 1,800,000 acre-feet. With respect to the recognition of the principle of the protection of beneficial uses existing at the time of the signing of the treaty, the pending treaty therefore does not go as far as the convention of 1906. Both treaties provide for the delivery of water according to schedule so as to secure the most beneficial use. Both treaties likewise provide for the use of certain facilities within the United States for the purpose of making delivery of Mexico's allocated share. The difference between the two treaties in this respect, however, is that under the convention of 1906, the United States agred to build Elephant Butte Dam at its own expense and deliver Mexico's waters to her at the expense of the United States whereas, in the case of the pending treaty, Mexico has to pay a proportionate part of the cost of construction and operation and maintenance of any American facilities which might be used, in whole or in part, for delivery of Mexico's water. The only exception is Davis Dam, which was designed primarily to re-regulate waters released from Lake Mead for the generation of hydroelectric power, and which had already been authorized for construction prior to the negotiation of the pending treaty. Both treaties contain "escape clauses" or clauses providing for reductions of Mexican deliveries in times of extraordinary drought or serious accident to the irrigation systems in the United States. This clause in the pending treaty was patterned after the one in the convention of 1906, the United States agreed to build Elephant Butte Dam at its treaties contain clauses limiting the Mexican rights to the amounts of water specificially allocated to her under the treaties.

4. Allocations on Rio Grande

So far as the Rio Grande is concerned the effects of the treaty are limited to the reach between Fort Quitman, Tex., and the Gulf of Mexico. Fort Quitman is about 85 miles below El Paso. The waters of the stream above Fort Quitman were allocated under the treaty of 1906.

The pending treaty allocates to the United States all of the waters contributed to the main stream by the principal United States tributaries below Fort Quitman, including the Pecos and Devils Rivers; one-third of the contributions to the main stream from the principal Mexican tributaries above Salineno, Tex., which Mexico guarantees to be not less than 350,000 acre-feet per year; and one-half of all other flows in the Rio Grande, except those of the San Juan and Alamo Rivers, Mexican tributaries below Salineno, Tex., which empty into the Rio Grande below the lowest feasible reservoir site. To Mexico is allocated all of the contributions to the main stream from the San Juan and Alamo Rivers; two thirds of the contributions from the principal Mexican tributaries above Salineno, Tex., subject to the guarantee to the United States of the minimum of 350,000 acre-feet per year from these sources; and one-half of all other flows occurring in the main channel of the Rio Grande. (Page 1808-9)

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(s) Jurisdiction Over Administration of Treaty Functions.

The jurisdiction of the United States section, as distinguished from that of the Commission, over the administration of treaty functions, is very limited. The American section is the representative of the United States in performing the treaty obligations of the

United States to Mexico and also in seeing that Mexico's obligations to the United States are carried out. The underlying idea is that all treaty functions should be centralized in an international agency, and that the functions to be performed by interior agencies, to the extent that they bear upon the performance of international functions, should be correlated and carried out in cooperation with the respective national section.

## Rio Grande

On the Rio Grande, for instance, the principal duties of the Commission will be to build, operate, and maintain the international works on the boundary portion of the river, and to keep account of the waters allocated to each country. The duty of the American section will be to measure inflows into the main stream from the American tributaries, so that the United States will receive credit therefor, and to measure certain diversions and uses which are chargeable against the United States allocations. With respect to the use within the United States of its share of the waters, neither the Commission nor the American section has any jurisdiction whatsoever.

Present existing diversions in both countries are fully protected by the treaty. With respect to those which may be made in the future, the sole province of the American Commissioner is to determine that, at the times and places where the diversions are proposed, there is sufficient water within the allocated share of the United States to satisfy the proposed use. Aside from this it is entirely a matter for State authorities under State laws, to determine the disposition of the waters. (Page 1814-5)

# APPENDIX V

MAJORITY REPORT OF SENATE FOREIGN RELATIONS COMMITTEE, REPORTING THE TREATY FAVORABLY. (G.P.O. No. 66319-45-1)

## TREATY WITH MEXICO RELATING TO THE UTILIZATION OF THE WATERS OF CERTAIN RIVERS

Monday, February 26, 1945. — Ordered to be printed Mr. George (for Mr. Connally), from the Committee on Foreign Relations, submitted the following

### REPORT

(To accompany Executive A and Executive H, Seventy-eight Congress, second session)

The Senate Committee on Foreign Relations, having had under consideration Executive A, Seventy-eighth Congress, second session, a treaty between the United States of America and the United Mexican States, signed at Washington on February 3, 1944, relating to the Rio Grande from Fort Quitman, Tex., to the Gulf of Mexico, and Executive H, Seventy-eighth Congress, second session, a protocol supplementary to the treaty, signed at Washington on November 24, 1944, hereby report the same favorably to the Senate without amendment and recommend that the Senate advise and consent to the ratification thereof.

1. The hearings.

The Senate Foreign Relations Committee conducted public hearings on the treaty and the protocol for a period of almost 5 weeks, commencing January 22, 1945. Almost 50 witnesses, principally from the Department of State, the Bureau of Reclamation,

and the eight States immediately affected, were heard during this period. Many of these witnesses represented the States of California and Nevada, which opposed the treaty. Six of the States immediately affected are officially on record, either by memorials of their legislatures or through their responsible State officials, as endorsing the treaty, and were represented at the hearings by witnesses. These States are Arizona, Colorado, New Mexico, Texas, Utah, and Wyoming.

2. Negotiations.

Negotiations with Mexico over the division of the waters of the Colorado River and the Rio Grande have been carried on intermittently since early in this century. The division of the waters of the Rio Grande above Fort Quitman, Tex., was effected by the convention of 1906. In 1927 the Congress passed an act authorizing the appointment of commissioners to study this problem in cooperation with Mexico. These negotiations failed and the water commission thus created was abolished by the Economy Act in 1932 and its functions were transferred to the American section of the International Boundary Commission, which has since carried on the studies. By act of Congress in 1935, the powers of the American section of this Commission were extended and the President, acting through the American section, was authorized to carry on further studies in cooperation with Mexico looking toward the negotiation of a treaty. It was on the basis of this congressional act that the studies and negotiations were carried on which led to the formulation of the terms of the pending treaty.

The Department of State conducted its studies of this matter in consultation and cooperation with a semiofficial committee called the Committee of Fourteen and Sixteen, which represented the seven Colorado River Basin States and the power interests. Early in 1943 this Committee, by a vote of 5 to 1 (California dissenting and

Nevada not voting), approved a formula for the allocation of waters of the Colorado River to Mexico, upon which the terms of the present treaty, so far as they relate to equitable division of the waters of the Colorado River, were based. After the approval of this formula by five of the Colorado River Basin States, negotiations with Mexico were resumed and the terms of the treaty were worked out in a series of meetings held in El Paso, Tex., and Ciudad Juarez, Mexico, by the representatives of the State Department and of the Ministry of Foreign Relations of Mexico, with both sections of the International Boundary Commission participating. These meetings were held from the early part of September to the latter part of December 1943. The treaty was signed in Washington February 3, 1944.

3. Analysis of the treaty.

(a) The Rio Grande. — The treaty allocates to the United States all of the waters contributed to the main stream by the principal American tributaries, one-third of the waters contributed to the main stream by certain large Mexican tributaries, which Mexico guarantees to be not less than 350,000 acre-feet a year, and one-half of all other flows in the main stream from any other source. The effect of this allocation is to divide the waters of the Rio Grande below Fort Quitman about equally between the two countries, although most of the water originates in Mexico. The effect also is to give to the United States about 60 percent of the waters which can be feasibly impounded in main stream reservoirs. Provision is made for the construction of three international reservoirs on the main stream at certain general locations. This is very important, since the communities along the Rio Grande are now subject to alternating floods and droughts. In

times of low run-off, communities in the lower Rio Grande Valley of Texas are frequently deprived of enough water, not only for irrigation but also for the most essential domestic uses. In contrast to this, almost 4,000,000 acre-feet of water a year wastes annually into the Gulf of Mexico because it comes largely in the form of large floods which cannot be put to beneficial use but which do enormous damage in transit.

The only solution to the problems of the lower valleys in both countries is the construction of large reservoirs on the main stream of the Rio Grande which will serve the dual purpose of controlling the floods and conserving water for domestic, agricultural, and industrial uses. When this has been accomplished, not only will existing uses in the United States be protected but an expansion of almost 100 percent will be permitted in the lower Rio Grande Valley of Texas, thus doubling the output of citrus fruits, vegetables, and other crops of major importance to the domestic economy. The cost of these storage dams is to be paid by the two countries in proportion that capacities are assigned therein for use by each country. Provision is made for diversion works to supply the needs of each country and the Commission is authorized to make studies regarding the feasibility of other works, such as those for river rectification and the development of hydroelectric energy at the main stream reservoirs. None of these additional works may be built, however, without the express agreement of both countries. The development of cheap power along the Rio Grande will add much to the industrial development of communities along this river in both countries.

(b) The Colorado River . . . . . There are a number of treaties among the civilized nations of the world relating to the distribution of waters of international streams. The United States is a party to

two of them. In all of these treaties of which the committee is aware, existing uses at the time of the negotiations in the lower riparian state have been protected, and in many cases provision has been made for expansion in both the upper and lower states within the limit of the available supply.

The provisions of the convention of 1906 between the United States and Mexico, and those provisions of the pending treaty relating to the Colorado River, are somewhat parallel. All the waters of the Rio Grande above Fort Quitman originate in the United States, as do the waters of the Colorado River. In the convention of 1906 Mexico was allocated a quantity of water sufficient to supply her maximum uses at any time prior to the negotiation of the treaty. The amount allocated to Mexico on the Colorado River by the pending treaty is not quite sufficient for that purpose. In both treaties, the water is to be delivered according to schedules. The extraordinary drought provisions in each are similar. Both require the use of storage and other facilities in the United States. Under the 1906 convention the waters were to be stored and delivered to Mexico entirely at the expense of the United States. Under the pending treaty Mexico is to pay a proportionate part of the cost of all facilities in the United States, except Davis Dam, used to deliver Mexico's water . . . . .

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(d) Administrative features. – General supervision over the administration of the treaty is delegated to the International Boundary Commission, created by the convention of March 1, 1889, with Mexico, its name being changed by the pending treaty to the International Boundary and Water Commission. The treaty serves merely to extend the jurisdiction of this Commission to embrace

general supervision over the carrying out of treaty functions. Several witnesses have attacked the administrative provisions of the treaty as conferring unwarranted powers, executive, legislative, and judicial, on the Commission and on the American section thereof, without control by the Congress and the courts. The committee believes that these charges are unfounded. The treaty and the protocol make plain that the jurisdiction of the Joint Commission is confined entirely to works on the boundary portions of the international streams and on the international land boundary. Neither section may exercise any jurisdiction over works or functions in the country of the other.

The works which the treaty requires to be built are specifically enumerated and narrowly limited. On the Rio Grande they consist solely of the three international storage dams and the diversion works necessary to put the impounded waters to beneficial use. Provision is made for studies regarding other works, such as those for river rectification, but none of these works can be built without the consent of both Governments, and the Congress, through its control of appropriations, exercises an effective veto power. The situation is the same in Mexico, since the constitutional systems of the two countries are very similar.

On the Colorado River . . . . . Many decisions of the Commission, especially reports and recommendations regarding the construction of works, require the advance approval of the two Governments. Over all other decisions of the Commission, by the express provisions of article 25 of the treaty, the two Governments retain a veto power, which may be exercised by either government within a period of 30 days from the time a given decision is officially communicated to them.

By the provisions of paragraph (d) of article 24, the Commission is vested with initial jurisdiction over the settlement of disputes that may arise between the two Governments with respect

to the interpretation or application of the treaty, but here again the decision of the Commission is subject to the express approval of both Governments. Their decisions, then, are in effect advisory only. No jurisdiction is conferred on the Commission or on either section to pass upon private rights of any character. While the treaty provides for the acquisition, by the two Governments, of title to certain property or works necessary to the fulfillment of the treaty provisions, it should be borne in mind that each Government, within its own borders, has exclusive jurisdiction in this matter. Property in the United States, of course, must be acquired either by voluntary agreement with the owners or through condemnation proceedings. In such proceedings, the courts will pass upon the necessity of the acquisition and the amount of compensation which should justly be paid the owner. This is a function which must be performed by the Department of Justice, and the Congress exercises control by providing or withholding the necessary funds.

Some question had arisen as to whether the jurisdiction and functions of the American section of the Commission might not encroach upon those of other Federal agencies of this Government. To set this matter at rest, the protocol to the treaty confines the jurisdiction of the Commission and its two sections to works on or along the boundary and to those to be devoted exclusively to the performance of treaty functions, each section within its own country. As to all other works within the United States, even though they may be used in part for the discharge of treaty functions, they remain under the exclusive jurisdiction and control of those Federal agencies which now or hereafter may be vested by domestic law with such jurisdiction and control. By way of illustration, the Davis Dam, Imperial Dam, and the All-American Canal will remain under the exclusive jurisdiction of the Bureau of Re-

clamation ,although these works are to be used in part for the delivery of the Mexican allocation. The use of Boulder Dam is not contemplated under the treaty for the delivery of Mexican waters. Further to clarify this matter, a memorandum of understanding has been entered into between the Department of State and the Department of the Interior, specifically providing for the functions to be performed by the agencies of each, subject, of course, to the control of Congress. It is the opinion of the committee that the American section of the Commission, in the discharge of its functions in this country, is subject to the jurisdiction of the courts to the same extent as any other agency of the Government. It is the conclusion of the committee therefore, that the functions, both of the Joint Commission and of the American section, are adequately circumscribed and that there is no encroachment upon the jurisdiction of any other agency, Federal, State or local.

Nor do the powers granted the Commission or the United States section in any way interfere with State or private rights. Nothing in the treaty, directly or by implication, gives to the Commission or the United States section any jurisdiction or control over the allocations of the waters of the streams among the States, or over private rights therein. These matters will remain within the control of the duly constituted State and local authorities. On the Rio Grande, the United States is allocated all the waters of its principal tributaries. Hence, it makes no difference in the administration of the treaty whether these waters are used on lands bordering the tributaries, or whether they are allowed to flow into the main stream for use below. Existing uses are fully protected. As to any future uses, the sole function of the United States section is to determine that, at the time and place where the new diversion is proposed, there is sufficient water in the reservoirs or the river, within the share of the United States, to meet the proposed use.

This is the matter of precise and instant determination, no discretion being vested in the United States section. All other matters relating to the diversion, distribution and use of these waters are left for the determination of the State authorities. No other construction can be placed on the treaty.

Many precedents exist for the administration of treaties of this character by international agencies, and experiences has shown that this is the most practicable method of handling the many complex matters that necessarily arise in the day-to-day administration of comparable treaty functions. The agency selected for this purpose in the pending treaty is a Commission which has a record of successful handling of boundary problems over a period of more than half a century.

While the subject is not particularly relevant to the question of the administrative features of the treaty which has just been discussed, one further point should be briefly noted. Several witnesses, appearing in behalf of certain labor organizations . . . . .

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4. Conclusion

The treaty is of great importance in the administration of our foreign affairs. The question of an equitable division of the waters of the international streams has been a sore spot in our relations with Mexico that has plagued the two Nations for half a century. It is one of the few matters of major importance still pending between them. It should be borne in mind that the rights and obligations of the two countries in the international streams are mutual and reciprocal, not merely unilateral. The treaty does not give

away any natural resource. It simply recognizes these mutual rights and obligations. In so doing it not only sets at rest the fears and uncertainties which are the source of misunderstanding and bitterness in the great river basins in both countries but also allows development to proceed in an orderly manner and on a firm basis. Opportunity is afforded for a tremendous expansion in the basins of the Rio Grande and the Colorado River in the United States and for the development of worth-while projects of the first magnitude. Of equal importance, the treaty will remove an ever-increasing threat to friendly relations between the United States and Mexico.

For the information of the Senate, there are appended hereto and made a part of this report, the President's messages transmitting the treaty and the protocol to the Senate, the reports of the Secretary of State to the President on the treaty and the protocol, and the texts of the treaty and the protocol. We believe that the treaty and the protocol are advantageous to the United States and should be ratified.

The Committee vote on the treaty was as follows: 18 yeas and 4 nays.

# APPENDIX VI

EXCERPTS FROM SENATE FLOOR DEBATE ON RATIFICATION OF TREATY, 79TH CONGRESS, 1ST SESSION, (91 Congressional Record, parts 2 and 3; letters in parentheses before each excerpt added by counsel for identification.)

(a) MR. CONNALLY . . . . In 1906 the United States and Mexico agreed upon a treaty relating to the waters of the Rio Grande as affecting interests in Mexico. In the treaty the United States agreed that a certain amount of water rising within the United States and supposedly impounded by the Elephant Butte Dam in New Mexico, should be allocated to the Mexican interests opposite the city of Juarez on the theory that before the erection of the dam the Mexican residents had utilized the waters of the Rio Grande for irrigation purposes, and that they had thereby become entitled to an equitable right at least by prior appropriation, to the continuance of the use of those waters. We have had no difficulty in the administration of that treaty in the past. By that treaty the United States acknowledged the equitable right which lies within the boundary of prior use. (Part 2, page 2334)

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(b) MR. CONNALLY. Exactly. I tried to point that out a little while ago, that the United States recognized the equity of prior appropriation when it made the treaty with regard to Juarez and the water from the Elephant Butte Dam. If there is no treaty as was well suggested by the Senator from Arkansas under the doctrine of prior use and prior appropriation. there being no obligation whatever on Mexico to restrict her expansion, she could go on to the limit of her requirements and put more land in cotton or any other crop she might see fit to raise. (Part 2, page 2336)

(SENATE FLOOR DEBATE, CONTINUED)

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(c) MR. CONNALLY . . . . Let me say another word and then I shall dismiss the Rio Grande. I was saying a little while ago that the Rio Grande, of course, was the boundary stream between Texas and Mexico. Millions of acre-feet of valuable water now escape into the Gulf of Mexico. Why? Because we cannot build any reservoirs on the river without a treaty. The Rio Grande is an international stream, and we must have the consent of Mexico to build such dams. We have tried to erect such structures.

In the meantime, beginning in the early part of this century, about 1906, 1907, 1908, or 1910, there has grown up within the Rio Grande Valley affected a magic territory. There are three or four counties in that territory which were in the early part of this century a rank area of mesquite and prairie dogs, and so forth and so on. An agricultural industry was established there which produces grapefruit and oranges such as many Senators have on their breakfast tables. Dams could not be built. So in order to irrigate that land so as to make it fruitful it was necessary to pump from the river every gallon of the water used on the land. Literally millions of dollars were spent in erecting pumping plants to pump the water from the river.

As a matter of fact, counting the tributaries on the Mexican side of the Rio Grande, the greater amount of water flowing down the Rio Grande originates in Mexico. By damming up those tributaries Mexico could cut off a large part of the water supply of the Rio Grande Valley. She has already built reservoirs on some of those tributaries which threaten the economic life and the safety of this rich agricultural territory on the Texas side of the river.

. . . . . There is no objection on the part of anyone to the treaty

(SENATE FLOOR DEBATE, CONTINUED)

so far as it relates to the Rio Grande (Part 2, page 2337)

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(d) MR. O'DANIEL I think there is no objection on the part of anyone in this country to the terms of the treaty relating to the Rio Grande River. The objection is all centered on the terms which affect the Colorado River.

MR. CONNALLY My colleague is correct in his statement. There was no controversy before the committee as to the part relating to the Rio Grande. (Part 2, page 2338)

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(e) MR. CHANDLER . . . . . I wish to express on my own behalf a fear of giving absolute power to a commissioner.

As I understand the treaty of 1909 with Canada, under it provision was made that the commissioners be authorized only to recommend, and the governments could later recommend propositions as between them. But under the pending treaty the commissioners will have absolute authority unless I misunderstand. (Part 2, page 2339)

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(f) MR. CHANDLER . . . . . I believe that under the provisions of the pending treaty the American Commissioner would have the right to do anything he wished to do with respect to those projects, and that from his decision there could be no appeal. If the Senate wants to give him such broad authority, well and good, but it seems

and clarify the involved language of this treaty by reservations attempting to interpret it.

MR. MILLIKIN. Mr. President, I think it should be said also that proponents of the treaty make strong argument that the treaty as it is, is clear. These reservation are being drafted and will be proposed to meet honest differences of opinion on that subject. How can reasonable men approach the problem in any other way? The reservations either will or they will not meet the objections such as those to which the distinguished Senator from Utah has referred. If the treaty is not clear when we have finished with it, if it is not a good treaty, it should be defeated.

MR FULBRIGHT. Mr. President, will the Senator yield?

MR. MILLIKIN. I yield.

MR. FULBRIGHT. Is not one of the basic principles inherent in our system the division of power between the legislative and the executive branches? In the past, before there had grown up quite the antagonism between the executive and legislative branches which now exists, this sort of provision for approval by the executive would not have been questioned. It is not so unusual for the State Department to be given the power over its agent in the American section. Is not that a fairly normal way to handle the matter?

MR. MILLIKIN. It is the custom of Congress to delegate the widest sort of powers to executive agents. There is nothing novel about it. From my standpoint, I do not like much of it; but it certainly is customary. I venture to say that when we are through treating with the world situation, the delegations of power in this treaty will not seem like anything at all. However, to the extent that there is any ambiguity in this treaty, I want it clarified and

(SENATE FLOOR DEBATE, CONTINUED)

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(h) MR. CHANDLER . . . . . I believe that by the ratification of this treaty we would resign absolute power to the Commissioner, who could issue orders which would not be subject to review. The policy which was declared in the Canadian treaty is not declared in this treaty. The suggestion was made by one of the chief proponents of the treaty that it could be used to destroy, if necessary, local private ownership of water rights in the interest of a national policy. He stated that the rights of individuals should not be taken into consideration, and that no attention should be paid to them; that they should be merely brushed aside. If the Senate is ready to vote such absolute authority into the hands of one commissioner, it is ready to do something which it has never done before. I think it would be a serious step to take against the American States. (Part 2, page 2345)

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(i) MR. LUCAS. I am taking the statement the Senator made. The Senator said we were entitled to all this water if we wanted it, and I am stating that we are not entitled to all the water, under the principles of international law, under the doctrine of prior appropriation, and according to the testimony of every witness, even the California witnesses who agree to give Mexico at least 750,000 acre-feet a year and guarantee a maximum of 750,000 acre-feet a year. (Part 2, page 2347)

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(j) MR. CONNALLY . . . . . Do we not recognize that smaller

(SENATE FLOOR DEBATE, CONTINUED)

and weaker nations have their equitable claims, and that under the law of prior usage there is an existing right to the use of water by the people in Mexico, the little homesteaders there who for years have been sustaining themselves by irrigating land with water drawn from the river, water which we have not appropriated, which we have not used, which we have let go on down the river in a mad rush in time of flood and which we have let dry up in times of drought? (Part 2, page 2347)

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(k) LETTER FROM MR. HERBERT HOOVER, QUOTED BY MR. HAWKES . . . . . 3. *Administrative provisions: This treaty foreshadows the more important post-war treaties to come, and is an ominous precedent. It delegates excessive power to a commission of two individuals, one American and one Mexican.*

MR. CONNALLY. Mr. President, will the Senator yield?

MR. HAWKES. Certainly I yield.

MR. CONNALLY. Permit me to say about the treaty that while its proponents do not think the objections about the administrative powers of the United States section of the Commission give ground for any fears along the line expressed by the Senator, I wish to say that I am prepared to offer, and we are having drawn now, a reservation which would place in the resolution of ratifications language making it entirely clear that the powers of the International Commissioner representing the United States as to appropriations shall in no case be binding until the Congress shall authorize the appropriations, and also making it clear – which I think the treaty already does – that the American Commissioner shall not have any power or jurisdiction in any wise to interfere with State laws or with the

(SENATE FLOOR DEBATE, CONTINUED)

(r) MR. CORDON. I share the feeling which has been expressed by the distinguished Senator from Texas. However I became somewhat disturbed when I noted in the reservations proposed by the Senator from Texas that paragraph (c) provides:

*That nothing contained in the treaty or protocol shall be construed to authorize the United States section of the said Commission to control the distribution of water to users within the territorial limits of the individual States.*

Upon reading that paragraph it occurred to me that there must have been some uncertainty on the part of the Senator from Texas as to the meaning of the protocol or paragraph (c) would not have been included in the reservations.

MR. CONNALLY. Mr. President, if the Senator from California will yield, I shall reply to the Senator from Oregon.

MR. DOWNEY. I yield.

MR. CONNALLY. The reservation was not drawn because of any fear I had entertained but because several Senators stated that they wished to make clear the limitation of power of the Boundary Commission. I acceded to their request. The Boundary Commission has never asserted or exercised any such authority as that which has been suggested. It has informed the committee and me personally that it does not intend to exercise any such authority in the future. So I readily agreed to the reservation.

I may also say to the Senator from Oregon that the Senator from Colorado (Mr. Millikin) and I are working on the reservations and have taken into account the views and fears of various Senators. The language will no doubt be changed in such a way

to me to be an almost complete abandonment of principles contained in the Canadian treaty which have been adhered to for a long time. We have gotten along pretty well under the Canadian treaty. The treaty now before the Senate would give to two men more authority than we have ever given to any other persons in our history.

I read from article 2:

*The Commission shall in all respects have the status of an international body.*

That is a new one to me. We have many bodies, but I do not recall that we ever had an international body before.

Mr. President, the powers given to the commissioner under the treaty are absolute. Of course, if the Senate wants to give him such powers, very well. I probably would not vote for them, but whether he shall be given such powers is something for the Senate to decide. (Part 2, page 2340)

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(g) MR. CHANDLER. Mr. President, as a practical matter if this treaty is ratified we are going to guarantee Mexico so much water. If we ever become short of water the Commissioner is going to have to deliver the water, and if he cannot find the water in one place he will find it some place else. If he decides to take it from Arizona he will take it from Arizona; and if he decides to take it from Utah he will take it from Utah. He will be bound to deliver water to Mexico in the quantity provided by the treaty. (Part 2, page 2342)

(SENATE FLOOR DEBATE, CONTINUED)

I want the powers to stay where they belong. (Part 3, page 2825)

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(n) MR. DANIEL. (after describing at length the economy of the Lower Rio Grande Valley, its dependence on the flow of the Rio Grande, recurrent shortages of water, and the threat to this economic region posed by burgeoning Mexican development) . . . . Since these developments in Mexico came into operation in about 1943, there have been increasingly more serious shortages of water experienced in the United States. The Mexican facilities are so located that it is possible for them to divert practically the entire low flow of the river. Any increased use by Mexico, where the construction of lateral and distribution systems is now taking place, will inevitably result in greater shortages of water to the lands in the United States. Thus, a highly critical situation exists, and it is evident that something must be done and done quickly to protect our present investments.

The water treaty now under consideration if and when ratified will afford this protection to the lands in the United States by providing for the construction of storage dams on the Rio Grande to furnish the necessary regulation of water. No other solution to this perplexing problem has been discovered.

The Rio Grande is again very different from the Colorado River in regard to this danger to existing uses. Whereas any increase in the use by Mexico on the Rio Grande will very definitely curtail present uses in the United States, no such danger to existing uses on the Colorado River in the United States is evident.

The treaty makes ample provision for the protection of all of

these existing uses on both streams in the United States, with the opportunity for further expansion on both streams. (Part 3, page 3093)

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(o) MR. DOWNEY . . . . . Clearly this treaty, in the opening paragraph, reenforced with extraordinary and dictatorial powers in other parts of the treaty, sets up an international body and clothes it with judicial capacity and power to decide every possible dispute between States and private individuals, both in the United States and Mexico, which may arise out of the observance and execution of the treaty. (Part 3, page 3114)

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(p) MR. DOWNEY . . . . . As we shall later see, this treaty is designed so as completely to bypass not only our courts and Congress, but even the President of the United States. As we shall also later see, the two State Departments, are given extraordinary powers. (Part 3, page 3115)

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(q) MR. DOWNEY Mr. President, before the quorum call I had been discussing a proposed amendment to strike out paragraph 2 of article 2, giving an international body, the International Boundary and Water Commission, judicial capacity to decide all disputes arising in the United States from this treaty. (Part 3, page 3118)

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operations within the United States or any of our Federal or State agencies such as the Reclamation Service or any of the State agencies. (Part 2, page 2655)

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(l) MR. DOWNEY . . . . . If this treaty is approved as it has been submitted we shall have created a czar with such tremendous power over the Rio Grande, the Tijuana, and the Colorado River that it is difficult to evaluate or anticipate it. There will be only one Commissioner, who, in my opinion, will have powers far beyond those ever given any official in Great Britain or the United States. So far as Great Britain is concerned, I am referring to recent times. Dean Roscoe Pound himself characterized it as the most extreme and arbitrary grant of authority ever made or attempted to be made in the United States. (Part 3, page 2811)

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(m) MR. MURDOCK. The Senator advises us this afternoon that reservations interpreting the treaty are now being drafted. The reason for and the necessity for the drafting of those reservations is what? An expansion of power by this International Boundary and Water Commission. There is one part of the treaty which says – and which is objected to by Dean Pound – that they reserve to themselves the right to settle all disputes that may arise as the result of the execution and the administration of the treaty. That brings me to the conclusion that the State Department was not interested in simplifying the division of water, but what it was interested in is an expansion of power, something involved, something to make them bigger, and in my opinion, that is what they have brought to the Senate for ratification. I doubt seriously that we can clear up

as to satisfy those Senators. I am willing to agree to the changes so long as they do not violate any of the explicit terms of the treaty. (Part 3, page 3171)

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(s) MR. TAFT. Perhaps the Senator would explain the reservations, and state why they are necessary to the treaty, which I had thought was already perfect.

MR. CONNALLY. Some of us think it is perfect, but other Senators fear that in some instances the language of the treaty confers powers which its proponents do not believe it does confer. Without in any way changing the treaty, we propose to add these interpretative reservations, saying that "so and so," according to our view, means "so and so," with the hope of satisfying Senators who have complained particularly about the language. I do not wish to take up the time of the Senate, unless the Senate desires that I explain the reservations. They are self-explanatory, but I can explain them briefly. (Part 3, page 3279)

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(t) MR. WILEY . . . . . There is no question that the treaty is a very good treaty so far as Texas is concerned. There is no dispute about that fact. . . . . The situation on the Colorado is not as clear. (Part 3, page 3314)

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(u) MR. MILLIKIN. Mr. President, the preliminary history leading to this particular reservation (paragraph b of the resolution

of advice and consent), was a criticism which the American Bar Association had made. The American Bar Association took the position that the treaty was profligate in its grant of administrative and judicial powers to the Boundary Commission. Therefore, those who drafted the reservation were endeavoring to meet the criticism and make very clear the fact that nothing contained in the treaty or protocol should destroy constitutional or statutory controls within the territorial limits of the United States.

I am trying to learn the exact point which the Senator from Ohio has in mind. If the reservation did not exist, under the theory of the American Bar Association, and those who have echoed such theory in the hearings and before the Senate, if they are correct in their interpretation of the treaty, statutory and constitutional controls would be advisable.

The language of the reservation meets the claim head-on by stating that statutory controls and constitutional processes in the domestic field shall not be deemed to be inapplicable. That is the intent of the reservation.

MR. TAFT. The question is whether the intent is carried out by the language of the reservation. I agree with the intent.

MR. CONNALLY. Mr. President, will the Senator yield?

MR. TAFT. I yield.

MR. CONNALLY. I have before me a letter from Mr. William L. Ranson, former president of the American Bar Association, with regard to this matter. I think it would be well to read a paragraph from the letter. I shall not take time to read the entire letter. It states in part as follows:

(SENATE FLOOR DEBATE, CONTINUED)

*The American Bar Association has not opposed the treaty or asked that it be amended. The American Bar Association has not concerned itself with the merits of the treaty. The association's point is a very simple and proper one, which can be dealt with, I think. It is also important, as I see it.*

*The American Bar Association's point is this: Insofar as the American Commissioner acts alone, as to internal matters in the United States, he should be and remain subject to the laws of the United States, to the powers of Congress, and to judicial review as to his quasi-judicial determination.*

We were trying to meet through the reservation the views expressed in the letter from which I have read. (Part 3, page 3319)

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(v) THE CHIEF CLERK. As proposed to be amended reservation (b) would read:

*(b) Insofar as they affect persons and property in the territorial limits of the United States, the powers and functions of the Secretary of State of the United States, the Commissioner of the United States section of the International Boundary and Water Commission, the United States section of said Commission, and any other officer or employee of the United States, shall be subject to the statutory and constitutional controls and processes. Nothing contained in the treaty or protocol shall be construed as impairing the power of the Congress of the United States to define the terms of office of members of the United States section of the International Boundary and Water Commission or to provide for their appointment by the President by and with the advice and consent*

*of the Senate or otherwise.*

MR TAFT. Mr. President, this is the amendment, which was discussed on Thursday last, as I recall. Its principal purpose is to turn the words around so that the direct statement is made that the powers granted to the Boundary and Water Commission shall be subject to statutory and constitutional controls and processes, instead of simply saying that nothing in the treaty shall remove them from such controls and processes, because it is not clear to my mind that in making a treaty we do not by making the treaty remove them from such statutory and constitutional controls and processes.

MR. CONNALLY. Mr. President, I will say to the Senator from Ohio that I am willing to accept his amendment.

MR. TAFT. I had understood that it was satisfactory.

I might call attention to one other change which I think is important. The reservation as written made applicable statutory or constitutional controls to administrative powers and functions of the Commission. It may be that some of the powers of the Commission are semijudicial in nature; the Commission in fact is to make decisions and enforce them and therefore I am not certain that the word "administrative" makes it clear that all such powers would be subject to constitutional and statutory restrictions.

MR. WHITE. Mr. President, I take it the Senator construes the word "administrative" as restrictive and exclusive and that that is the reason for removing it.

MR. TAFT Yes. It seemed to me that it might be claimed that the powers which were judicial in nature were not covered by the reservation.

(SENATE FLOOR DEBATE, CONTINUED)

MR. CONNALLY. The Senator included that in his original amendment?

MR. TAFT. Yes. I was merely calling attention to it as a part of the change which is being made.

THE PRESIDING OFFICER. The question is on the amendment offered by the Senator from Ohio (Mr. Taft) to reservation (b) proposed by the Committee on Foreign Relations as modified.

The amendment to the reservation was agreed to. (Part 3, page 3373)

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(w) MR. MILLIKIN. (discussing the omission of the words, "or any other officer or employee of the United States" from paragraph c of the resolution of advice and consent). The omission of that language was not inadvertent. The point is that the United States, through the Bureau of Reclamation, will have under its control or within its ownership all the works necessary to meet the Mexican obligation. The fear was that the Commission, or the United States Section thereof, or that the United States Commissioner, might try to interfere with water rights and water administration within the States. But I believe that the distinguished senior Senator from Maine will recognize at once that under all of our reclamation projects and under any of these reclamation plants which will have to be administered to satisfy the treaty, every time a water requisition to meet the treaty is made there necessarily will be a division of water in the reservoir between the private users under the reclamation projects and under power projects, and the Mexican obligation. Therefore, if we included any officer or employee, that would include the officers and employees of the Bureau

of Reclamation, and if we could reach them with this sort of thing, we would be powerless to meet our obligation to Mexico. (Part 3, page 3373)

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(x) MR. MURDOCK. The Senator is exactly correct. We say by reservation (c) to the people who are named first under the treaty, "You cannot do it." They cannot do it under the protocol. They are precluded by the protocol from doing this directly, but it must be done by the Bureau of Reclamation. So the Senator is exactly correct. We say to a group over here, the American section of the International Boundary and Water Commission, "You cannot do it directly. You keep your hands off. But you issue orders to your agents over here, the Bureau of Reclamation, and they can do the very thing which we attempt to prohibit and inhibit by reservation (c)." (Part 3, page 3374)

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(y) MR. CONNALLY. Mr. President, I should like to have the attention of the Senator from Colorado (Mr. Millikin) and the Senator from Maine (Mr. White). The background of this reservation is that certain Senators feared that under the treaty the International Boundary Commission or the Secretary of State would undertake to interfere with the private water rights of States. So this reservation was designed to deny them that sort of authority. (Part 3, page 3375).

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(z) MR. MURDOCK. If it is wrong for the American Section of

(SENATE FLOOR DEBATE, CONTINUED)

International Boundary and Water Commission to control and alter the distribution of domestic rights in the United States, then it is just as wrong for it to do so through the agency of the Bureau of Reclamation. (Part 3, page 3375)

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(aa) MR. MCFARLAND. Mr. President, I myself, worked rather hard for reservation (c). I wished to have reservation (c) placed in the treaty primarily for the reason that in Arizona we have old, established water rights dating back to the 1860's, which I wished to protect.

I do not want the Commission or anyone else to have the authority to come into my State and alter or control irrigation in any manner. That was the reason why I insisted upon and worked for the adoption by the committee of reservation (c). That was my interpretation of the reservation; I believe that if reservation (c) is adopted, the Commission can look only to one source, namely, the Davis Dam, which will be the regulatory dam for the delivery of water to Mexico. I realize that it must necessarily follow that if there were a shortage of water, the different States would have to contribute in accordance with the Colorado River compact. As I stated last Thursday, I would not want anyone to have the right to come into my State and lift the head gates and let the water down. (Part 3, page 3376)

(bb) MR. MURDOCK . . . . . Now, the distinguished junior Senator from Arizona has said he does not wish to have the International Boundary and Water Commission interfere with water rights in his State or on the tributaries of the Colorado River in his State, but still he is perfectly willing, as I understand, to have the Bureau of Reclamation step into the picture as the employee or agent of the

International Boundary and Water Commission and do the very job which he would not permit to be done directly by the Commission. Is that the Senator's position?

MR. MCFARLAND. No, Mr. President, that is not my position. They do not have that jurisdiction over our dams. But under the treaty they would have jurisdiction over the Davis Dam. That is my interpretation of the purpose of Davis Dam as a regulatory dam. It is my opinion that, with this provision included, neither the Bureau of Reclamation nor anyone else could come within the boundaries of my State and control irrigation there.

Of course, as pointed out by the Senator from Colorado, someone would have to say how much of the water we could get. I realize that someone would have to apportion the water to the various States, under the compact, in the case of a water shortage. But under no circumstances could they disturb the old, established water rights, particularly those of the Salt and Gila Rivers in the State of Arizona. That was what I was working to protect. I do not wish to have them meddle with the waters of the Salt and Gila Rivers in any way, and I believe reservation (c) accomplishes my purpose. (Part 3, page 3377)

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(cc) MR. CONNALLY. Mr. President, would it satisfy the Senator, disregarding for the moment the amendment of the Senator from Maine, if we say "the United States section of such Commission, directly or indirectly to alter or control the distribution of water," and so forth?

MR. MURDOCK. I wish to say to the Senator that the amendment offered by the Senator from Maine was not anticipated by me.

(SENATE FLOOR DEBATE, CONTINUED)

Inasmuch as the able Senator from Maine offered the amendment, it is not a question as to what I want but what he wants. I told the Senator from Texas a few days ago, when he agreed to my reservation, that I would vote for the treaty. I intend to vote for the treaty, but I do not want to fool myself —I do not want to fool Senators here on the floor of the United States Senate — into the belief that we can guarantee 1,500,000 acre-feet of water to Mexico and not interfere with rights in the United States necessarily and sufficiently to make the delivery.

MR. CONNALLY. The question I asked the Senator was whether he would be agreeable to the reservation as printed if we changed it to say "the United States section of said Commission, directly or indirectly," and so forth? His complaint was that the Commisson would act indirectly. Would it satisfy him to say "directly or indirectly"? (Part 3, page 3374)

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(dd) MR. CONNALLY. Would it be agreeable to the Senator to omit the White amendment (which was to add "or any other officer or employee of the United States" to the enumeration of employees in paragraph c of the ratification resolution) and to insert the words "directly or indirectly"?

MR. MURDOCK. That would be agreeable.

MR. CONNALLY. Would that be agreeable to the Senator from Maine?

MR. WHITE. That would be satisfactory to me – or Mr. President, I retract those words, and will leave it by saying that I shall not object. (Part 3, page 3381)

# APPENDIX VII

OPINION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT, reported at 226 F. 2d 1.

(September 30, 1955.)

Before TUTTLE, CAMERON and JONES, Circuit Judges.

JONES, Circuit Judge: Two Water Control and Improvement Districts, political subdivisions of the State of Texas, and two individuals, filed a complaint against a Texas corporation and a number of individuals, seeking a declaratory judgment and injunction. Federal jurisdicaion rests solely on 28 U.S.C.A. § 1331, which is:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

The plaintiffs, appellants here, assert that they have certain rights to divert and use waters of the Rio Grande which inure by virtue of or are protected by the Treaty between the United States and Mexico effective November 8, 1945, and a protocol supplementary thereto. This action was brought for a declaration of plaintiffs' asserted rights and to prevent the taking of waters from the Rio Grande by the defendants, who are the appellees here, in derogation of the rights of the plaintiffs.

In the complaint it is said that prior to the treaty waters of the Rio Grande were being diverted and used in the Counties of Hidalgo, Willacy and Cameron, Texas, for the irrigation of some

500,000 acres of land and for supplying water for domestic, municipal and industrial purposes to a population of 250,000. Of the water so diverted and used, a substantial portion had its origin in Mexico and it had begun to tap the tributaries in its territory to the lessening of the flow of the Rio Grande. Drought added to the diminution of the flow of the stream. Little of the periodic flood flows were used. Problems also existed with respect to the waters of the Colorado River. With these we are not here concerned.

In the treaty preamble the purpose was recited as being "to fix and delimit the rights of the two countries with respect to the waters . . . of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, United States of America, to the Gulf of Mexico, in order to obtain the most complete and satisfactory utilization thereof . . ."

The treaty begins with definitions, the only one of which we need notice being:

> "'To divert' means the deliberate act of taking water from any channel in order to convey it elsewhere for storage, or to utilize it for domestic, agricultural, stock-raising or industrial purposes whether this be done by means of dams across the channel, partition weirs, lateral intakes, pumps or any other methods." Treaty, Art. 1 (d).

The International Boundary Commission, set up under a prior treaty, was continued with new powers and duties under a name changed to the International Boundary and Water Commission. An allotment of the waters of the Rio Grande was made by the treaty between the two countries. Agreements were made for the construction of dams and for the study and planning of flood control works plants for generating electric current. Regulations were contemplated to provide for water conservation programs.

(OPINION OF COURT OF APPEALS, CONTINUED)

The claim of plaintiffs is based upon and solely upon the treaty and particularly upon Article 9 of the treaty which provides:

"(a) The channel of the Rio Grande (Rio Bravo) may be used by either of the two countries to convey water belonging to it.

"(b) Either of the two countries may, at any point on the main channel of the river from Fort Quitman, Texas, to the Gulf of Mexico, divert and use the water belonging to it and may for this purpose construct any necessary works. However, no such diversion or use, not existing on the date this Treaty enters into force, shall be permitted in either country, nor shall works be constructed for such purpose, until the Section of the Commission in whose country the diversion or use is proposed has made a finding that the water necessary for such diversion or use is available from the share of that country, unless the Commission has agreed to a greater diversion or use as provided by paragraph (d) of this Article. The proposed use and the plans for the diversion works to be constructed in connection therewith shall be previously made known to the Commission for its information.

"(c) Consumptive uses from the main stream and from the unmeasured tributaries below Fort Quitman shall be charged against the share of the country making them.

"(d) The Commission shall have the power to authorize either country to divert and use water not belonging entirely to such country, when the water belonging to the other country can be diverted and used without injury to the latter and can be replaced at some other point on the river.

"(e) The Commission shall have the power to authorize temporary diversion and use by one country of water belonging to the other, when the latter does not need it or is unable to use it, provided that such authorization or the use of such water shall not establish any right to continue to divert it.

"(f) In case of the occurrence of an extraordinary drought in one country with an abundant supply of water in the other country, water stored in the international storage reservoirs and belonging to the country enjoying such abundant water supply may be withdrawn, with the consent of the Commission, for the use of the country undergoing the drought.

"(g) Each country shall have the right to divert from the main channel of the river any amount of water, including the water belonging to the other country, for the purpose of generating hydroelectric power, provided that such diversion causes no injury to the other country and does not interfere with the international generation of power and the quantities not returning directly to the river are charged against the share of the country making the diversion. The feasibility of such diversions not existing on the date this Treaty enters into force shall be determined by the Commission, which shall also determine the amount of water consumed, such water to be charged against the country making the diversion.

"(h) In case either of the two countries shall construct works for diverting into the main channel of the Rio Grande (Rio Bravo) or its tributaries waters that do not at the time this Treaty enters into force contribute to the flow of the Rio Grande (Rio Bravo) such water shall

belong to the country making such diversion.

"(i) Main stream channel losses shall be charged in proportion to the ownership of water being conveyed in the channel at the times and places of the losses.

"(j) The Commission shall keep a record of the waters belonging to each country and of those that may be available at a given moment, taking into account the measurement of the allotments, the regulation of the waters in storage, the consumptive uses, the withdrawals, the diversions and the losses. For this purpose the Commission shall construct, operate and maintain on the main channel of the Rio Grande (Rio Bravo), and each Section shall construct, operate and maintain on the measured tributaries in its own country, all the gaging stations and mechanical apparatus necessary for the purpose of making computations and of obtaining the necessary data for such record. The information with respect to the diversions and consumptive uses on the unmeasured tributaries shall be furnished to the Commission by the appropriate Section. The cost of construction of any new gaging stations located on the main channel of the Rio Grande (Rio Bravo) shall be borne equally by the two Governments. The operation and maintenance of all gaging stations or the cost of such operation and maintenance shall be apportioned between the two Sections in accordance with determinations to be made by the Commission."

By a protocol between the two governments, an agreement was made specifying the jurisdiction of agencies of the respective governments as to the construction or use of the works required in the performance of the treaty. The protocol does not contain any provision that has application to the problems here presented. In

the Resolution of the Senate ratifying the treaty it was stipulated:

"Resolved, . . . That the Senate advise and consent to the ratification of . . . a treaty between the United States of America and the United Mexican States, . . . subject to the following understandings, and that these understandings will be mentioned in the ratification of this treaty as conveying the true meaning of the treaty, and will in effect form a part of the treaty: . . .

"(b) Insofar as they affect persons and property in the territorial limits of the United States, the powers and functions of the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, the United States Section of said Commission, and any other officer or employee of the United States, shall be subject to the statutory and constitutional controls and processes. Nothing contained in the treaty or protocol shall be construed as impairing the power of the Congress of the United States to define the terms of office of members of the United States section of the International Boundary and Water Commission or to provide for their appointment by the President by and with the advice and consent of the Senate or otherwise.

"(c) That nothing contained in the treaty or protocol shall be construed as authorizing the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, or the United States Section of said Commission, directly or indirectly to alter or control the distribution of water to users within the territorial limits of any of the individual States."

The complaint avers that except for a few periods of flood flow the waters of the Rio Grande have been inadequate to supply uses existing prior to the treaty, and notwithstanding this fact and without any allocation of water by the United States Section of the International Boundary and Water Commission the defendants have diverted and used water from the stream for irrigation purposes. These diversions and uses were begun subsequent to the treaty. The complaint says "There is not now, nor is there any present prospect for, a supply of water adequate to supply both the diversions and uses existing on November 8, 1945, [the effective date of the treaty] and the defendants' diversions and uses."

Some of the defendants filed motions to dismiss. Others filed answers. The District Court granted the motions to dismiss as to the movant defendants and dismissed the action of its own motion as to the answering defendants. The dismissal was placed upon two grounds, lack of jurisdiction over the subject matter and failure to state a claim upon which relief could be granted.

It is apparent that the original claims of the plaintiffs had their origin under appropriative rights for use on lands not adjacent to the river, while the defendants claim riparian rights based upon ownership of land adjoining the river. The primary issue arises from the assertion by the plaintiffs that they have a right, created or protected by the treaty, to continue to divert and use the waters of the Rio Grande to the same extent as was done by them at the time of the treaty date without any diminution of such waters by the defendants. The defendants counter with the position that their riparian rights were at all times paramount to the appropriative rights of the plaintiffs, that such rights were vested property rights, that it was not intended that the treaty should create or protect any individual rights to water or the use thereof, and that if the treaty be construed to give it the effect of lessen-

ing the incidents of the riparian ownerships of defendants, the treaty provision so construed would be a deprivation of property without due process of law under the Fifth Amendment to the Constitution of the United States.

Since there is no diversity to support Federal jurisdiction, the action can be maintained only if some right, title, privilege or immunity dependent upon the treaty is set up or claimed so as to require the Court to apply, construe or pass upon the treaty in determining the right asserted. *Muse v. Arlington Hotel Co.*, 168 U. S. 430, 18 S. Ct. 109, 42 L. Ed. 531. See also *Crystal Spring Land & Water Co. v. City of Los Angeles*, 177 U. S. 169, 20 S. Ct. 573, 44 L. Ed. 720; *Devine v. City of Los Angeles*, 202 U. S. 313, 26 S. Ct. 652, 50 L. Ed. 1046. In their complaint, after outlining the basis of the allocation of the waters of the Rio Grande between the United States and Mexico, the plaintiffs aver: "Thus the investments and activities of these plaintiffs and other American users perfected a claim to the share of the flow of the lower Rio Grande which was allotted to the United States by the treaty, which claim was cognizable in international practice and was recognized in and given effect by the treaty." In their brief the plaintiffs say that "The sole right asserted against the Appellees and the sole basis of relief sought by appellants is the protection of their water supply conferred on them by said treaty provisions." It was held at an early date that "A case . . . may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either." *Cohen v. Virginia*, 6 Wheat. (19 U. S.) 264, 5 L. Ed. 257. This rule still prevails and applies to cases arising under treaties as well as under the Constitution or laws. The case before us meets the test.

Since plaintiffs insist that their asserted priority of right to divert and use waters of the Rio Grande arises from the treaty,

it necessarily follows that under plaintiffs' theory the rights of defendants would be paramount in the absence of the treaty. Absent the treaty the appropriative right of plaintiffs "is in the nature of a hereditament appurtenant to the tract for the benefit of which the appropriation was made." 44 Tex. Jur. 60, Water § 44. On the other hand, no treaty intervening, the right of each of the defendants would be defined as: "The right of the owner of riparian land to use the water of the stream upon or bordering his tract is an appurtenance thereof in the nature of an incorporeal hereditament. It constitutes property within the meaning of the Constitution, and cannot be taken without his consent, save, perhaps, by condemnation and the payment of a just compensation." 44 Tex. Jur. 47, Water § 34. The observation made in an earlier case by the District Judge whose order is under review that "the Texas water laws and decisions are in hopeless confusion," is quoted in our opinion in *Martinez v. Maverick County Water Control and Improvement District*, 5th Cir. 1955, 219 F. 2d 666.

We have no choice but to agree with the defendants that if we should adopt the plaintiffs' theory of the construction of the treaty the result would be a holding that by the treaty the plaintiffs had acquired property rights which they did not have before and that defendants had been divested of property rights which they owned prior to the treaty. To so hold would bring the treaty into collision with the Constitution. In a case involving an earlier treaty between the United States and Mexico this Court, in an opinion by Judge Waller, said:

> "We should seek to avoid, if possible, a decision adjudging a treaty to be in conflict with the Constitution. It is not necessary to a decision in this case for us to pass upon the question of whether the treaty is violative of the prohibitions of the Federal Constitution, as we would

be compelled to do if the treaty required the construction contended for by Appellants." Amaya v. Stanolind Oil & Gas Co., 5th Cir. 1946, 158 F. 2d 554, Cer. den. 331 U. S. 808, 67 S. Ct. 1191, 91 L. Ed. 1828, Reh. den. 331 U. S. 867, 67 S. Ct. 1530, 91 L. Ed. 1871.

In the case before us, as in the Amaya case, we would avoid the question as to conflicts between treaty and Constitution. Under our view there is no such question presented.

The rule for construction of treaties has been thus stated: "Treaties are to be construed as other contracts according to the intent of the parties."" The Yulu, 5th Cir. 1934, 71 F. 2d 635, Cer. den. 293 U. S. 589, 555 S. Ct. 104, 79 L. Ed. 684. Cited in the case of *The Yulu is Wright v. Henkel*, 190 U. S. 40, 23 S. Ct. 781, 47 L. Ed. 948, where it is held that "Treaties must receive a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purpose." Other like holdings might, if need be, bee cited at length.

Plaintiffs, in their brief, say that the "treaty provision is clear and needs no construction, it was intended to mean just what it says." We do not read into the treaty that which plaintiffs contend it says. The manifesst purpose of the contracting parties is declared in the preamble to the treaty to be, among other things, "to fix and delimit the rights of the two countries with respect to the waters . . . of the Rio Grande." The language of the treaty relied upon by plaintiff is:

> "Either of the two countries may . . . divert and use the water belonging to it . . . However, no such diversion or use, not existing on the date this Treaty enters into force shall be permitted in either country . . . "

The plaintiffs with plausibility insist that, as used in the treaty, "government" and "country" have different meanings and that "country" refers to the land and people. There is, we agree, a difference in the meaning of the two words. Like many another term the word "country" cannot be given a hard and fast definition applicable alike to every situation in which it is employed. *Commissioner of Internal Revenue v. Chicago Portrait Co.*, 7th Cir. 1931, 50 F. 2d 683. We cannot say that it has an identical meaning in each of the instances where it is used in the treaty under consideration. We conclude, however, that as used in the last quoted portion of the treaty it means the two nations, the United States and Mexico. The word government," as used in the treaty, refers to the political agency through which the sovereignty of the nation is expressed and exercised.

The treaty apportioned the water of the Rio Grande and allocated the share that might be diverted and used on each side of the river, but without making or intending to make any provision as to how or by whom the water so apportioned and allocated should be used upon being diverted. Increases in diversion to and use upon either side is prohibited except upon the conditions stated. We think it was intended by the parties to the treaty that to each nation should be left the power of making determinations, pursuant to its own law, of those who are, may become, or cease to be, entitled to the use of the waters secured by the treaty to such nation, and their relative rights among themselves. If any intent had been present to create or protect or give a priority to individual property rights of one group resulting in the diminution or divestment of those of another group, the operative language would have been couched in more explicit terms.

The United States Supreme Court has set forth some of the generally applicable limitations on the Federal power by saying:

> "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. McCormick v. Sullivant, 10 Wheat. 202. The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal government. The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal government was created, and would seriously embarrass the landed interests of the State." United States v. Fox, 94 U. S. 315, 24 L. Ed. 192.

The doctrine of the Fox case has been held applicable in cases involving treaties. *Amaya v. Stanolind Oil & Gas Co., supra.* We do not say, and there is no need for saying, that a treaty cannot in any event supersede the laws of a State with respect to property rights and the manner of their transfer both voluntary and by operation of law, nor do we hold that a treaty may not change the method by which such rights may be determined or enforced. We only say that the treaty in question does not purport to have any such effect as to the respective water rights of the parties to this cause. We find nothing in the protocol that has bearing on the problem submitted by this appeal.

Our attention is directed to the hearings before the Senate Committee and to the evidence there adduced, to Senate discussions in the Committee room and on the Senate floor, to statements of the Secretary of State, of the Attorney General of Texas and others, and to other treaties involving other nations and other rivers. There is not, as we view the case, any need for a discussion of these matters. Such factors are to be considered and weighed when and only when the meaning of a treaty provision is uncertain and the treaty language is ambiguous or admits of more than one construction. See *Nielson v. Johnson*, 279 U. S. 47, 49 S. Ct. 223, 73 L. Ed. 607. The language of that portion of the treaty involved in this appeal is neither uncertain, ambiguous nor susceptible of more than one construction. We find nothing in the hearings, discussions, statements or other extraneous matters that would impel us to a conclusion different than that which we have reached. But, we think, if any uncertainty did exist it would be dispelled, and if any ambiguity were present it would be removed by the ratifying resolution of the Senate which provides:

> "That nothing contained in the treaty or protocol shall be construed as authorizing the Secretary of State of the United States, the Commissioner of the United States Section of the International Bountary and Water Commission, or the United States Section of said Commission, directly or indirectly to alter or control the distribution of water to users within the territorial limits of any of the individual States."

The treaty provides for the disposition of such waters as might, after its effective date, become available for diversion and use upon the impounding of flood flows by dams and other works. These treaty provisions and the disposition of such waters as might be made available by them are not in this cause.

The Order of Dismissal entered by the District Court was proper and is AFFIRMED.

TUTTLE, Circuit Judge: I concur in the result.

FILED
FEB 15 1956
HAROLD B. WILLEY, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955

No. 634

HIDALGO COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 1, *ET AL.*
*Petitioners*

VERSUS

WYATT C. HEDRICK, *ET AL.*
*Respondents*

## RESPONDENTS' BRIEF OPPOSING WRIT OF CERTIORARI

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## SUBJECT–INDEX

Preliminary Statement ..... 1–2

Powers conferred on International Boundary & Water Commission and United States Section of that Commission operate only as high contracting powers ..... 2–5

The "understandings" preclude an interpretation of the Treaty which would deprive Respondents of their constitutional rights ..... 5–17

Respondents' rights as riparian proprietors are protected by Treaty of Guadalupe Hidalgo as well as constitutional processes ..... 17–22

Conclusion and Prayer ..... 22

## APPENDICES

"A"—Digest of testimony of witnesses for the Department of State and the United States Section, International Boundary Commission on the United States-Mexican Water Treaty before the Senate Foreign Relations Committee ..... 25–27

"B"—Testimony of Hon. Grover Sellers, Attorney General of Texas, February 14, 1945, before the Committee on Foreign Relations ..... 29–30

"C"—House Concurrent Resolution No. 4 of the Legislature of the State of Texas, adopted January 10-11, 1945 .. 31

"D"—Translation from Escriche's *"Diccionario de legislación y jurisprudencia* (1842) topic *Aguas* ..... 33–35

# INDEX OF AUTHORITIES


CONSTITUTION, TREATIES, AND ACTS OF CONGRESS

Constitution of Texas, 1876, Sec. 8, Article XIV ..... 20
Article 9 of Treaty of November 8, 1945 ..... 3
"Understandings" made part of Treaty of November 8, 1945 .. 3
Treaty of Guadalupe Hidalgo ..... 18, 19
Act of February 8, 1850, Gammel's Laws of Texas, III–582 .... 20
Act of February 10, 1852, Gammel's Laws of Texas, III–941 .. 20
Act of February 11, 1854, Gammel's Laws of Texas, III–1471 20
Act of February 11, 1860, Gammel's Laws of Texas, IV–1471 20
Act of February 11, 1854, Gammel's Laws of Texas, III–1533 20
Act of August 15, 1870, Gammel's Laws of Texas, VI–375 ..... 20

CASES

*Bigham Bros.* v. *Port Arthur Channel & Dock Co.*, 100 Texas 192 ..... 7
*Board of Water Engineers* v. *McKnight*, 111 Texas 82 ..... 7
*Cavazos* v. *Treviño*, 35 Texas 133 ..... 20
*Chicago, Rock Island & Gulf Railway Co.* v. *Tarrant County Water Control and Improvement Dist. No. 1*, 123 Texas 432 ..... 2, 8, 15
*Christy* v. *Pridgeon*, 4 Wallace 196 ..... 5
*Clark* v. *Hills*, 67 Texas 141 ..... 20
*Cowan* v. *Hardeman*, 26 Texas 267 ..... 20
*Cox* v. *Robison*, 105 Texas 426 ..... 20
*Green* v. *Robison*, 105 Texas 367 ..... 20
*Haynes* v. *State*, 100 Texas 426 ..... 20
*Humphrey-Mexia Co.* v. *Arseneaux*, 116 Texas 603 ..... 2, 7, 12
*Kenedy Pasture Co.* v. *State*, 111 Texas 200 ..... 20

*League* v. *Egery*, 24 Howard 264 ..... 5
*Lux* v. *Haggin*, 69 California 255 ..... 8
*Manry* v. *Robison*, 122 Texas 216 ..... 20
*McGehee Irrigation Co.* v. *Hudson*, 85 Texas 587 ..... 6
*Miller* v. *Letzerich*, 121 Texas 248 ..... 20
*Mitchell* v. *Bass*, 33 Texas 259 ..... 20
*Motl* v. *Boyd*, 116 Texas 82 ..... 2, 7, 10, 20
*Mud Creek Irrigation Co.* v. *Vivian*, 74 Texas 171 ..... 6
*Parker v. El Paso County Water Improvement Dist. No. 1*, 116 Texas 631 ..... 2, 7, 13
*Philadelphia Company* v. *Stimson*, 233 U.S. 605 ..... 5
*State* v. *Balli*, 144 Texas 195 ..... 20
*State* v. *Corrigan*, 95 SW 95, 101 ..... 19
*State* v. *Gallardo*, 106 Texas 274 ..... 20
*State* v. *Grubstake Investment Assn.*, 117 Texas 53 ..... 20
*State* v. *Russell*, 85 SWR 288 (Writ Refused) ..... 20
*State* v. *Sais*, 47 Texas 307 ..... 20
*St. Louis* v. *Rutz*, 138 U.S. 226 ..... 5
*Texas Company* v. *Burkett*, 117 Texas 16 ..... 2, 11
*Texas-Mexican Ry. Co.* v. *Locke*, 74 Texas 370 ..... 20
*U.S.* v. *Gerlach Livestock Company*, 339 U.S. 725 ..... 5, 10
*U.S.* v. *Sutherland*, 19 Howard (U.S.) 364 ..... 19
*Watkins Land Co.* v. *Clements*, 98 Texas 528 ..... 6
*White* v. *Burnley*, 20 Howard 235 ..... 5

TEXTS

Escriche's *Diccionario de legislación y jurisprudencia*, topic *Aguas*, ..... 21

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955

No. 634

HIDALGO COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 7, *ET AL.*
*Petitioners*

VERSUS

WYATT C. HEDRICK, *ET AL.*
*Respondents*

## RESPONDENTS' BRIEF OPPOSING WRIT OF CERTIORARI

Respondents respectfully oppose the granting of Petitioners' application for certiorari to the United States Court of Appeals, Fifth Circuit, in that:

## PRELIMINARY STATEMENT

It is not disputed but that Petitioners claim the right to use the waters of the Rio Grande to irrigate non-riparian lands under "appropriation" statutes of Texas, or that Respondents are riparian proprietors on the left or Texas bank of the Rio Grande

at various points in Webb, Zapata, Starr, and Hidalgo Counties in that State; nor that Petitioners are seeking a declaratory judgment [R. 21] interpreting the Treaty of November 8, 1945, between the United States and the Republic of Mexico for the Utilization of the Waters of the Rio Grande and other rivers, which would subordinate the constitutional rights of riparian proprietors on the Texas bank of the Rio Grande to a supposed right resulting from the actual use of such waters as of the effective date of the treaty; that is, November 8, 1945. Petitioners' real purpose is to obtain a construction of the treaty which will overturn a long line of decisions by the Supreme Court of Texas which define and limit the rights of riparian proprietors, as well as those of "appropriators" of water under the Texas statutes and safeguard those rights; more especially *Motl* v. *Boyd,* 116 Texas 82; *Parker* v. *El Paso County Water Improvement District No. 1,* 116 Texas 631; *Humphrey-Mexia Co.* v. *Arseneaux,* 116 Texas 603; *Texas Company* v. *Burkett,* 117 Texas 16; *Chicago, Rock Island & Gulf Railway Company* v. *Tarrant County Water Control and Improvement District No. 1,* 123 Texas 432.

## RESPONDENTS' FIRST COUNTERPOINT

Powers conferred on the United States section of the International Boundary and Water Commission, United States and Mexico, by Article 9 of the treaty of November 8, 1945, operate only to control the division of the waters of the Rio Grande below Fort Quitman, Texas, as between the high contracting parties, and cannot, and do not, create or affect the rights of American water users as among themselves.

### Statement and Argument

The Treaty between the United States and Mexico for the Utilization of the Waters of the Rio Grande below Fort Quitman, Texas (and of other rivers), was signed at Washington, February 3, 1944, and a protocol thereto was signed at Washington, November 14, 1944. Treaty and protocol were clarified and

amended, and ratification advised "subject to certain understandings" by Resolution of the Senate of the United States, adopted April 24, 1945. The Treaty was ratified by Mexico, October 16, 1945, and "subject to said understandings" as recommended by the Senate, was ratified November 1, 1945, by the President of the United States. Ratifications were exchanged at Washington, November 8, 1945; and the Treaty was proclaimed by the President "subject to said understandings," as recommended by the Senate, November 27, 1945. The Treaty, under its terms, took effect November 8, 1945, when ratifications were exchanged.

Pertinent text of Article 9 of the Treaty, as signed February 3, 1944, reads:

> "(a) The channel of the Rio Grande (Rio Bravo) may be used by either of the two countries to convey water belonging to it.
>
> "(b) Either of the two countries may, at any point on the main channel of the river from Fort Quitman, Texas, to the Gulf of Mexico divert and use the water belonging to it and may for this purpose construct any necessary works. However, no such diversion or use, not existing on the date this Treaty enters into force, shall be permitted in either country, nor shall works be constructed for such purpose, until the Section of the Commission in whose country the diversion or use is proposed has made a finding that the water necessary for such diversion or use is available from the share of that country, unless the Commission has agreed to a greater diversion or use as provided by paragraph (d) of this Article. The proposed use and the plans for the diversion works to be constructed in connection therewith shall be previously made known to the Commission for its information."

The United States Senate, by its Resolution of Ratification advised and consented to ratification of the Treaty, and the protocol supplementary thereto

". . . Subject to the following understandings, and that these understandings will be mentioned in the ratification of this treaty as conveying the true meaning of the treaty, and will in effect form a part of the treaty: . . .

"8. (b) *Insofar as they affect persons and property in the territorial limits of the United States,* the powers and functions of the Secretary of State of the United States, the Commissioner of the United States Section of said Commission, and any other officer or employee of the United States, *shall be subject to the statutory and constitutional controls and processes.* . . .

"8. (c) *That nothing contained in the treaty or protocol shall be construed as authorizing* the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, or the United States Section of said Commission, *directly or indirectly to alter or control the distribution of water to users within the territorial limits of any of the individual States.*"

Without violating these "understandings" the American Section of the International Boundary and Water Commission, United States and Mexico, cannot apply the provisions of Article 9 of the treaty otherwise than as safeguarding the division of waters as between Mexico and the United States.

Local law aside, and absent elucidation supplied by the Resolution of Ratification, Article 9 of the Treaty does not purport to accord to Petitioners individually, or as a class, any better rights to the use of the waters of the Rio Grande than they may have had on the effective date of the Treaty; nor does it purport to take from Respondents, or other riparian proprietors, their rights to the use of such waters existing as of that date. The Treaty was so construed by the officials of the Department by which it was negotiated, prior to the adoption of the "understandings."

[See 'Digest of Testimony of Witnesses for the Department of State and the United States Section, International Boundary

Commission, on the United States–Mexican Water Committee before the Senate Foreign Relations Committee"; Hearings before the Committee on Foreign Relations, United States Senate on Treaty with Mexico relating to the Utilization of the Waters of Certain Rivers, February 12, 13, 14, and 15, 1945, Part 5, pp. 1801–1816, printed in Part as Appendix "A" to this brief.]

And by competent authorities of the State of Texas: ["Testimony of Hon. Grover Sellers, Attorney General of Texas, February 14, 1945", before the same Committee id. Part 4, p. 1247, printed in part as Appendix "B" to this brief; and "House Concurrent Resolution No. 4 of the Legislature of the State of Texas, adopted January 10–11, 1945," in evidence before the Senate Foreign Relations Committee, id. Part 4, p. 1243, printed in part as Appendix "C" to this brief.]

## RESPONDENTS' SECOND COUNTERPOINT

Respondents' rights as riparian proprietors are protected by "constitutional and statutory controls and processes," as well as by the Treaty of Guadalupe Hidalgo between the United States and Mexico, and the "understandings" which are made part of the treaty of November 8, 1945, preclude an interpretation of Article 9 of the treaty which would deprive them of these constitutional rights.

### Statement and Argument

It is well settled that in actions of this character affecting appurtenances to land the Federal Courts apply the local laws of the state in which the land is situated, subject to the constitutional powers of the government of the United States. *United States* v. *Gerlach Livestock Company*, 339 U.S. 725; *Philadelphia Company* v. *Stimson*, 223 U.S. 605; *St. Louis* v. *Rutz*, 138 U.S. 226; *Christy* v. *Pridgeon*, 4 Wallace 196; *League* v. *Egery*, 24 Howard 264; *White* v. *Burnley*, 20 Howard 235. The "understandings" which forbid the Secretary of State and the United States Section of the International Boundary and Water Commission "directly or indirectly to alter or control the distribution

of waters to users within the territorial limits of any of the individual states," and require that their powers and functions "shall be subject to the statutory and constitutional controls and processes" insure the application of that rule in the instant case.

The Supreme Court of Texas has never hesitated to speak plainly of the protection accorded riparian rights through constitutional guaranties. In a line of decisions extending over two-thirds of a century that court has held:

In 1889 in *Mud Creek Irrigation Co.* v. *Vivian;* 74 Texas 171:

> "The legislature had no power to take away or impair the vested rights of riparian owners without providing for a just compensation."

In 1893 in *McGehee Irrigation Co.* v. *Hudson;* 85 Texas 587:

> "Plaintiffs' rights were such as could not be taken without condemnation and compensation . . . It was their right to have the water flow through their land in its accustomed channels; and to use it for all purposes for which a riparian proprietor may use the water so flowing."

In 1905 in *Watkins Land Co.* v. *Clements;* 98 Texas 528:

> "Subject to the right of natural use by other riparian proprietors, each riparian owner is entitled to use the water of a stream which flows by or through his land for the purposes of irrigation; provided such use is reasonable considering all the circumstances under which it is made."

In 1906 in *Bigham Bros.* v. *Port Arthur Channel & Dock Co.,* 100 Texas 192:

> "The right of a riparian owner to take water from the stream is property and comes within the protection of

the Constitution . . . Article 1, Section 17 . . . prescribes the rule . . . 'No person's property shall be taken, damaged or destroyed without adequate compensation being made, unless by consent of such person'."

In 1921 in *Board of Water Engineers* v. *McKnight;* 111 Texas 82:

> "The nature of the right of the riparian proprietor to apply flowing water to lawful uses, as property, is clearly disclosed by the Court's decision, by Chief Justice Stayton, that the proprietor could not be deprived of this right, even for the public benefit, without adequate compensation."

In 1926 in *Motl* v. *Boyd;* 116 Texas 82:

> "The decisions of this Court . . . appear to have settled the question that riparian rights to the use of the waters of the streams of this State for irrigation purposes were a part of the grants of land when the grants were made."

In 1927 in *Parker* v. *El Paso County Water Improvement Dis-No. 1;* 116 Texas 631:

> "The rights of the riparian to his just proportion of riparian water which flows by his lands is an incident to his ownership of the land, and is part and parcel of the land. It is within the constitutional guaranties."

In 1927 in *Humphrey-Mexia Co.* v. *Arseneaux, et al.,* 116 Texas 603:

> "A *riparian proprietor* . . . had the legal right to take riparian water from the stream and use it, or sell it for use on either riparian or non-riparian land unless it

thereby interfered with some other riparian owner . . . The oil company in this case . . . not being a riparian owner, could not object to the diversion of riparian water . . . The oil company had no justiciable interest in the riparian water."

In 1934 in *Chicago, Rock Island and Gulf Railway Co.* v. *Tarrant County Water Control and Improvement District No. One,* 123 Texas 432:

"Rights of riparians to use water, not only for domestic and household uses, but for irrigation as well, are vested rights, part of the grants of land when the grants were made."

An excellent summary of the English Common Law of riparian rights, when adopted as a rule of decision in Texas on January 20, 1840, and in California on April 13, 1850, is incorporated in the exhaustive opinion of the Supreme Court of California in *Lux* v. *Haggin,* 69 California 255, decided in 1886. The California Court summarized the English decisions which form the basis of the rule and said:

"By the common law the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passed with it, not as an easement or appurtenance, but as part and parcel of it. Use does not create the right, and disuse cannot destroy or suspend it. The right in each extends to the natural and usual flow of all the water, unless where the quantity has been diminished as a consequence of the reasonable application of it by other riparian owners, for purposes hereafter to be mentioned. . . .

"As to the *nature* of the right of the riparian owner in the water, by all the modern, as well as ancient, authorities the right in the water is *usufructuary,* and consists not so much in the fluid itself as in its uses, including the benefits derived from its momentum or im-

petus. Ang. Water-courses, sec. 94 and notes. But the right to a water-course begins *ex jure naturae,* and, having taken a certain course naturally, it cannot be diverted to the deprivation of *the rights* of the riparian owners below. So say all the common-law textbooks, and the decisions. Ang. sec. 93. *Agua currit et debet currere solebat* is the language of the common law.' Id: *Shury* v. *Piggot,* Bulst. 339; *Countess of Rutland* v. *Bowler,* 290. '*As a general proposition,* every riparian proprietor has a natural and equal right to the use of the water in the stream adjacent to his land, *without* diminution or alteration.' Washb. Easem. 319. 'Riparian proprietors are entitled, in the absence of grant, license, or prescription limiting their rights, to have the stream which washes their lands flow as is wont by nature, without *material* diminution or alteration.' Gould Waters, sec. 204. Each riparian proprietor has a right to the natural flow of the water-course undiminished, except by its reasonable consumption by upper proprietors. Ang. c. 4, *passim.* The right to the flow of the water *is inseparably* annexed to the soil, and passes with it, not as an easement or appurtenant, *but as a parcel. Use* does not create and *disuse* cannot destroy or suspend it. Each person through whose land a water-course flows has (in common with those in like situation) an equal right to the benefit of it as it passes through his land, for all useful purposes to which it may be applied; and no proprietor of land on the same water-course has a right *unreasonably* to divert it from flowing into his premises, or to obstruct it in passing from them, or to corrupt or destroy it. Chief Justice Shaw in *Johnson* v. *Jordan,* 2 Metc. 239. The right to the use of water flowing over land is undoubtedly *identified with the realty,* and is a real and corporeal hereditament. *Cary* v. *Daniels,* 5 Metc. 238. *Prima facie* every proprietor on each bank of a river is entitled to the land covered by the water to the middle thread of

the river, and has a right to the use of the water flowing over it. Occupancy of the flowing waters of a river *creates* no right, unless the appropriation be for a period which the law deems a presumption of right. Mr. Justice Story in *Tyler* v. *Wilkinson*, 4 Mason, 397. Whatever may be said of *Sampson* v. *Hoddinott*, I.C.B. (N.S.) 590, as bearing on the right to irrigate, it recognizes the riparian right. Cresswell, J., says: 'It appears to us that all persons having land upon a flowing stream have, by nature, certain rights to the use of the stream, *whether they exercise them or not*, and they may begin to exercise them whenever they will.'

"It has always been held that a grant of land carries with it the water flowing over the soil. The well-known maxim, *cujus est solum, ejus est usque ad coelum*, inculcates that land, in its legal signification, has an indefinite extent upward. *We need not add that rights to the use of water may be acquired by grant, under some circumstances by assent, and by adverse user and possession.*"

Subsequent history of the California law was related by Associate Justice Jackson in *United States* v. *Gerlach Livestock Company*, 339 U.S. 725.

Development of riparian law in Texas took a somewhat different turn, partly due to differences in terrain and climate, and partly to Texas' receiving greater impact from the earlier Spanish law. Riparian rights in California extended to all the waters of the stream. Texas only applies the riparian doctrine to the highest normal flow, leaving floodwaters subject to appropriate legislation by the State.

Earlier Texas cases had pointed out that riparian waters of Texas streams were not subject to appropriation, but the two types of waters were first fully distinguished, and rights of users fully defined in *Motl* v. *Boyd*, 116 Texas 82, decided in 1926, in which the Court said:

". . . we conclude that the cases in the main support our announcement that riparian rights attach only to the normal and ordinary flow of the stream as we have defined the normal and ordinary flow. . . .

"The construction and limitation which we give the doctrine of riparian rights in this state, under the conditions which are peculiar to us, is consistent with the legislative policy of the state covering a long period of time, and with the express declarations of the conservation amendment to the Constitution of the state.

. . .

"We therefore conclude that Spring creek is a public navigable stream under the statute, and that the title to its waters is in the state in trust for the public. . . . The waters are in trust for the public:

"First, for navigation purposes, which concerns all the public and is ordinarily regarded as a superior right;

"Second, the riparian waters of the stream are held in trust by the state for the riparian owners along its margins;

"Third, the nonriparian waters in the streams are held by the state in trust, to be controlled and disposed of by the state for the best interests of all the people;

"Fourth, the waters are in trust for uses and benefits not here involved.

"It now becomes necessary to determine what are the riparian and nonriparian waters of Spring creek. *We are of the opinion that riparian waters are the waters of the ordinary flow and underflow of the stream, and that the waters of the stream, when they rise above the line of highest ordinary flow,* are to be regarded as *flood waters, or waters to which riparian rights do not attach.*"

This doctrine was applied in *Texas Company* v. *Burkett,* 117 Texas 16, in which the Court held that

"Burket had the right to contract for the use of water obtained from his land on nonriparian land, so long as the supply was abundant and no injury resulted to lower proprietors. . . .

"What has been said with reference to riparian water flowing on the surface of the bed of the stream applies with equal force to riparian waters, if any, which might flow through the sand and gravel beneath the surface of the bed of the stream.

"The flood waters of a stream are those waters above line of ordinary flow of the stream, as defined by this court in the case of *Motl* v. *Boyd*, 286 SW 548. As to these waters, it is obvious that Burkett had not obtained a permanent water right in the sense that this term is used in the statutes. But he would have done so had the Texas Company desired it, since, as we have shown, he offered to obtain a statutory permit."

and in *Humphrey-Mexia Co.* v. *Arseneaux*, 116 Texas 603, where the holding was

"The water company did not claim under any rights by appropriation, *but asserted the right to pump the water out of the river and sell the same for mining purposes on both riparian and non-riparian land, purely as a riparian proprietor. . .*

"The defendant in error (Water Company) is *a riparian proprietor,* and *as such had the legal right to take riparian water from the stream, and use it or sell it for use on either riparian or nonriparian land,* unless it thereby *interfered with some other riparian* owner. *Texas Co.* v. *Burkett*, 296 SW 273. . . .

"All the waters in a stream below the highest line of its normal flow are riparian waters. *Motl* v. *Boyd* (Tex. Sup.) 286 SW 458. They therefore necessarily include the waters of the stream in holes or pools, after the river had ceased to flow, since these waters are within the

limit stated. In addition to this, all water when it comes, in the usual course of its migration, to rest permanently in a basin made by nature for that purpose, although it may have been flood water at one time, ceases to be flood water, and becomes a lake or pond.

. . .

"It is an elementary rule that riparian rights attach to all natural lakes and ponds, regardless of origin. . . .

Directly in point here is the decision in *Parker* v. *El Paso County Water Improvement District No. 1*, 116 Texas 631, relating to waters of the Rio Grande above Fort Quitman, Texas, and to that portion of the river affected by the treaty between the United States and Mexico signed May 21, 1906, in which the court said:

"We conclude that plaintiff in error's contention that his land, because riparian, could not be included in the improvement district is without merit, and it is overruled.

"If the plaintiff in error owns a ditch, *he cannot be deprived of property, nor its use, without consent or grant, or some form of due process.* U.S. Amend. 14; Const. Tex. Art. 1, Sec. 19; Long on Irrigation (2d Ed.) Sec. 118. But, as we understand the record in this case, and the decree and findings of the trial court, no effort is being made by the defendant in error to take plaintiff in error's property right in his ditch, or to deprive him of its use. As to that, he therefore was not entitled to an injunction.

*"The plaintiff in error, as a riparian, has the right to take his just correlative proportion of riparian water from the Rio Grande river, and conduct it to and use it on his land.* Long on Irrigation (2d Ed.) Secs. 34, 35; *Watkins Land Co.* v. *Clements*, 98 Tex. 578, 86 SW 733, LRA 964, 107 Am. St. Rep. 653; *Board of Water Engineers* v. *McKnight*, 111 Tex. 82, 92, 229 SW 301.

*"The Improvement District cannot take that water and distribute it without his consent, provided he desires to and does use it. The right of the riparian to his just proportion of riparian water which flows by his land is an incident to his ownership of the land, and is a part and parcel of the land. It is property within the constitutional guaranties.* Long on Irrigation (2d Ed.) Sec. 34; *Board of Water Engineers* v. *McKnight,* 111 Tex. 82, 92, 229 SW 301.

*"If the plaintiff in error does not take his proportionate share of the riparian water and use it, then that portion to which he is entitled, so long as he does not take it, under the modified rules of the common law applicable to the arid or semiarid states, increases the residue of riparian water in the river available for the use of others, including those whose lands are in the improvement district, and may be taken out of the river by them, or by the district for distribution, if they have authorized it to do so.* Long on Irrigation (2d Ed.) Sec. 31; Kinney on Irrigation (2d Ed.) Sec. 549, and vol. 2, Sec. 1611; 2 Farnham on Water Rights, Sec. 497; *San Joaquin, etc. Irr. Co.* v. *Fresno Flume & Irr. Co.,* 158 Cal. 626, 112 P. 182, 35 LRA (NS) 832; *Modick, etc.* v. *Booth,* 102 Cal. 151, 36 P. 431, and *Humphreys-Mexia Co.* v. *Arseneaux,* 297 SW 225, and *Texas Co.* v. *Burkett,* 296 SW 273.

"However, we do not understand that the improvement district claims any right to take plaintiff in error's proportionate share of the riparian water, if he desires to use it, or that it is interfering with plaintiff in error's right to do so. As we understand the record, the district only claims the right to take from the river the flood waters impounded by the Elephant Butte dam by the United States Reclamation Service (or other flood waters, if any, to which it may be entitled), and the just proportion of riparian water which the riparian pro-

prietors in the district have severally consented it shall take and distribute. This the district has the right to do. As to this water, plaintiff in error has no claim or right. *As a riparian owner, he is only justly entitled to his proportion of the riparian water, which is the water below the highest line of the normal flow of the river. Motl* v. *Boyd,* (Tex. Sup.) 286 SW 458. As to the water above that *line, whether impounded by the United States Reclamation Service or running after rainfall in the bed of the stream, plaintiff in error has no interest except as a landowner in the district* taking water under the distribution of the district.

"... The defendant in error in using the channel and banks of the Rio Grande for delivering its storm, flood, or rain water from the place of storage to the places of use, was acting clearly within the terms of the statute, and within its legal rights, regardless of the question of riparian rights. Revised Statutes 1925, art. 7548; Long on Irrigation (2d Ed.) Sec. 117; 2 McKinney on Irrigation (2d Ed.) Sec. 832; I Wiel on Water Rights (3d Ed.) Secs. 38a, 39, 40; *Hoffman* v. *Stone,* 7 Cal. 46; *Miller* v. *Wheeler,* 54 Wash. 429, 103 P. 641, 23 LRA (N.S.) 1065; *Butte Canal & D. Co.* v. *Vaughn,* 11 Cal. 143, 70 Am. Dec. 769; *Wiggins* v. *Muscupiabe,* 113 Cal. 182, 45 P. 160, 32 L.R.A. 667, 54 Am. St. Rep. 337; *Wutchmna Water Co.* v. *Pogue,* 151 Cal. 105, 90 P. 362."

while in *Chicago, Rock Island & Gulf Ry. Co.* v. *Tarrant County Water Control and Improvement District No. 1,* 123 Texas 432, the court affirmed:

*"We have heretofore held, after a lengthy review of grants under both the Mexican law and the laws of Texas, that rights of riparians to use water not only for domestic and household uses, but for irrigation as well,*

*are vested rights, part of* *he grants of land when the* *Boyd*, 116 Tex. 82, 108, 286 *grants were made. Motl* SW 458.

"Having the *vested ri* riparian necessarily has t ful means of making the which in a semi-arid cou ter in the streamways or may be done consistently ians, and upon such reaso may prescribe, a right wh defeat or unreasonably bu trollable grants to railw upon, or along streams ar Water, vol. 2, Sec. 475; K vol. 2, Sec. 842, p. 1476; App. 242, 122 SW 300."

to use water as stated, the authority to adopt any law- ercise of the right effective, ry means the storage of wa- their valleys, so far as this ith the rights of other ripar- able terms as the Legislature h the Legislature could not len by irrevocable or uncon- companies to cross, build water courses. Farnham on ney on Irrigation (2d Ed.) *acy* v. *Delery*, 57 Tex. Civ.

Holdings in the cited cases ainly distinguish the two types of water rights recognized by the aws of Texas; that is, the right of riparian proprietors to use "ri rian" waters, being the ordinary flow of the stream, which are dicated to this riparian use; and "non-riparian" or flood wat s, being waters flowing in the stream above the line of highe normal flow. Each riparian pro- prietor is entitled to use his ju t proportion of the water which flows by his land, and if he d es not take it, then that portion which he does not use increas the residue of riparian water to which other riparians are ent ed, and may be taken from the river by them. Riparian wate are not "unappropriated," and do not become subject to appr priation unless and until all ri- parian proprietors are satisfie and then only a a temporary measure and to prevent waste.

"Non-riparian" or flood wa ers are subject to appropriation, and may be utilized by the app opriator in passing, or stored for future use. As between approp iators the first in time is first in right.

Petitioners are "appropriato s," and their rights as such are

subordinate to those of all riparian proprietors, insofar as riparian waters are concerned. Injoining respondents from using their proportionate shares of riparian waters would only increase the proportionate shares of other riparians and would not benefit petitioners.

The situation as to waters stored in reservoirs pursuant to the treaty is reflected in the two last cited opinions. One of the purposes of the treaty was to provide for the storage of flood waters. Petitioners are entitled to the use of stored flood waters in their order of priority as appropriators as determined by statutory law. Respondents and other riparian proprietors are entitled to have surplus riparian waters stored in treaty reservoirs, "insofar as this may be done consistently with the rights of other riparians, and upon such reasonable terms as the Legislature may prescribe." The principal benefit which the riparian proprietors derived from the terms of the treaty is the use of treaty reservoirs for regulating the normal flow of the stream and impounding portions of the normal flow "in the streamways or in their valleys," for use in times of need, and to prevent waste.

Waters stored in treaty reservoirs must be measured and allocated as between the United States and Mexican shares. That is a function of the International Boundary and Water Commission of the United States and Mexico. Little additional calculation is needed to further allocate the United States share of stored waters of the Rio Grande as between stored riparian waters in which respondents share, and stored flood waters, in which petitioners are entitled to participate according to their statutory priorities and rights. This is a function of an agency of the State of Texas. Because Texas has not as yet provided such an agency, there is some present confusion in the distribution of these waters. But that does not affect respondents' rights.

## RESPONDENTS' THIRD COUNTERPOINT

Respondents hold their lands fronting on the Rio Grande under legitimate titles issued prior to March 2, 1836, by the governments of Spain and Mexico; and the rights and privileges accord-

ed by virtue of such grants which were part of the realty itself, or were servitudes or easements in connection therewith, including the reasonable use of the waters of the Rio Grande for irrigating the granted lands, remain in full force and effect, and are protected by the Treaty of Guadalupe Hidalgo, as well as by the "understandings" made part of the Treaty of November 8, 1945.

## Statement and Argument

Ratification of the "Treaty of Peace, Friendship, Limits and Settlement, between the United States of America and the United Mexican States," concluded at Guadalupe Hidalgo, February 2, 1848, to "Put an end to the calamities of the war which unhappily exists between the two Republics," was advised March 10, 1848, with amendments (which included suppression of Article X of the Treaty) by the Senate of the United States, and the Treaty as amended was ratified by the President of the United States, with explanations of the amendments, March 16, 1848, and proclaimed by the President, July 4, 1848.

Articles V and VII of that treaty defined the Rio Grande boundary and protected the navigability of that stream. Provisions as to navigation were abrogated by the treaty of November 8, 1945, but the terms of Article VIII of the former treaty continue in full force and effect. These provide:

> "Article VIII. Mexicans now established in territories previously belonging to Mexico and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they may possess in the said territories, or disposing thereof, and removing the proceeds wherever they please. . . .
>
> "In the same territories property of every kind now belonging to Mexicans not established there shall be inviolably respected. The present owners, the heirs of

these, and all Mexicans who shall hereafter acquire said property by contract shall enjoy with respect to it guaranties equally ample as if the same belonged to the citizens of the United States."

Section 2 of the explanatory provisions annexed to the Treaty in consequence of the Senate amendments, read:

"The American Government by suppressing the Xth article of the treaty of Guadalupe did not in any way intend to annul the grants of lands made by Mexico in the ceded territories. These grants, notwithstanding the suppression of this article of the treaty, preserve the legal value which they may possess, and the grantees may cause their legitimate (titles) to be acknowledged before the American tribunals.

"Conformably to the laws of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territories, are those which were legitimate titles under the Mexican law in California and New Mexico up to the 13th of May, 1846, and in Texas up to the 2nd of March, 1836."

In the words of the Supreme Court of the United States in *U.S.* v. *Sutherland*, 19 Howard (U.S.) 364, followed by the Supreme Court of Texas in *State* v. *Corrigan*, 94 SW 95, 101:

"The United States have bound themselves by a treaty to acknowledge and protect all *bona fide* titles granted by the previous government; and this court has no discretion to enlarge or curtail such grants to suit our own sense of property, or defeat just claims, however extensive, by stringent technical rules of construction, to which they were not originally subjected."

Substantially all titles along the Rio Grande emanating from former governments have been confirmed by the political au-

thorities of Texas, under one or another of a series of legislativ relinquishments, or as adjudicated in subsequent suits. On th political side, this appears from such Texas statutes as Act o February 8, 1850, Gammel's Laws of Texas, III–582; Act of Feb ruary 10, 1852, Gammel's Laws of Texas, III–941; Act of Feb ruary 11, 1854, Gammel's Laws of Texas, III–1533; Act of Feb ruary 11, 1860, Gammel's Laws of Texas, IV–1471; Act of Au gust 15, 1870, Gammel's Laws of Texas, VI–375; Section 8, Arti cle XIV, Constitution of Texas, 1876; while as to all legitimat Tamaulipas titles originating prior to December 19, 1836, th courts of Texas have uniformly held that:

> "The claimant may rely upon his title under the laws of this State, including the Treaty of Guadalupe Hidalgo, which is binding as a law."

*State* v. *Sais*, 47 Tex. 307; *Clark* v. *Hills*, 67 Tex. 141; *Texas Mexican Ry. Co.* v. *Locke*, 74 Tex. 370; *Haynes* v. *State*, 100 Tex 426; *Cavazos* v. *Treviño*, 35 Tex. 133; *State* v. *Russell*, 85 SW 288 (Writ Refused); *State* v. *Gallardo*, 106 Tex. 274; *Kened Pasture Co.* v. *State*, 111 Tex. 200; *State* v. *Balli*, 144 Tex. 195

In *Texas-Mexican Railway Co.* v. *Locke*, *supra*, the Court o Texas annulled Section 4, Article XIII, of the Texas Constitutio of 1876, *as being in conflict with the Treaty of Guadalupe Hi dalgo*, and, therefore, of Clause 2, Article XI, of the Constitutio of the United States.

It is, of course, the settled law of Texas, and generally, that i determining the rights of holders of title under grants from prio sovereigns, the controlling laws are those in effect when th grants were made. *Manry* v. *Robison*, 122 Texas 216; *Miller* v *Letzerich*, 121 Texas 248; *Motl* v. *Boyd*, 116 Texas 82; *State* v *Grubstake Investment Association*, 117 Texas 53; *State* v. *Ball* 144 Texas 195; *Cox* v. *Robison*, 105 Texas 426; *Green* v. *Robi son*, 109 Texas 367; *Mitchell* v. *Bass*, 33 Texas 259; *Cowan* v *Hardeman*, 26 Texas 267.

In the language of the Supreme Court of Texas in *Miller* v *Letzerich*, *supra:*

"*In determining the power of the Legislature to pass laws* affecting surface water rights for the state generally, we must necessarily consider the effect of the grants made by each sovereignty in their relationship to the subject. Lands in Texas have been granted by four different governments, namely the Kingdom of Spain, the Republic of Mexico, the Republic of Texas, and the State of Texas. Many millions of acres were granted by Spain, Mexico, and the Republic of Texas prior to the adoption by the latter of the common law of England as the rule of decision in 1840. *Motl* v. *Boyd,* 116 Tex. 82, 286 SW 458. . . .

"From these authorities it is plain, we think, that whatever title, rights and privileges the inhabitants of Texas received by virtue of land grants from the Spanish and Mexican governments, which were a part of the realty itself or were easements or servitudes in connection therewith, remained intact, notwithstanding the change in sovereignty and the subsequent adoption of the common law as a rule of decision."

For the reason that the Spaniards practiced irrigation while the English did not, the Spanish Law of Waters under which Respondents' lands were granted was more favorable to the riparian proprietor with regard to irrigation than was the English Common Law. This was especially true as to maintaining access to the stream by means of servitudes and easements. Thus Dr. Joaquin Escriche, noted Spanish Juris-Consult [*Diccionario de legislación y jurisprudencia,* topic *Aguas*] affirmed the Spanish law as being:

"When a property on a river bank is divided amongst several joint or common owners, in a manner that the portions which are assigned or sold to any of them, and which now form other small properties not bounding on the stream, they preserve, nevertheless, one with another, their right to the water in the same proportion

that they had before the division even when nothing should have been stipulated on this subject." (See Wiel on Water Rights in the Western States, 3d Ed., Section 1027, p. 964: Translation from Hall's Irrigation Development.)

Wiel's translation of Escriche's *Aguas* is annexed to this brief as Appendix "D."

## CONCLUSION

It cannot be presumed that the language of the treaty contained a hidden purpose to take property rights from one group of citizens and deliver them over to another, without just compensation and without due process of law, notwithstanding that the treaty was ratified and approved by the Senate upon express understandings that it should not have that effect.

Respondents respectfully submit that the petition for certiorari is without merit, and pray that it be denied.

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I, the undersigned member of the bar of this Court, attorney for the Respondents, certify that I have on this ——— day of February, 1956, deposited in the United States Post Office, with first class postage prepaid, one copy of the foregoing brief addressed to each of attorneys for Petitioners, viz. Sawnie B. Smith, P.O. Box 52, Edinburg, Texas, and Hill, Lochridge & King. P.O. Box 32, Mission, Texas.

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# APPENDIX "A"

DIGEST OF TESTIMONY OF WITNESSES FOR THE DEPARTMENT OF STATE AND THE UNITED STATES SECTION, INTERNATIONAL BOUNDARY COMMISSION ON THE UNITED STATES–MEXICAN WATER TREATY, BEFORE THE SENATE FOREIGN RELATIONS COMMITTEE. [Hearings before the Committee on Foreign Relations, United States Senate, on Treaty with Mexico relating to the Utilization of the Waters of Certain Rivers, February 12, 13, 14 and 15, 1945, Part 5 pp. 1801–1816]

"So far as the Rio Grande is concerned the effects of the treaty are limited to the reach between Fort Quitman, Tex., and the Gulf of Mexico. Fort Quitman is about 85 miles below El Paso. The waters of the stream above Fort Quitman were allocated under the treaty of 1906. (p. 1808)

"The pending treaty allocates to the United States all of the waters contributed to the main stream by the principal United States tributaries below Fort Quitman, including the Pecos and Devils River; one-third of the contributions to the main stream from the principal Mexican tributaries above Salineño, Tex., which Mexico guarantees to be not less than 350,000 acre-feet per year; and one-half of all other flows in the Rio Grande, except those of the San Juan and Alamo Rivers, Mexican tributaries below Salineño, Tex., which empty into the Rio Grande below the lowest feasible reservoir site. To Mexico is allocated all of the contributions to the main stream from the San Juan and Alamo Rivers; two-thirds of the contributions from the principal Mexican tributaries above Salineño, Tex., subject to the guarantee to the United States of the minimum of 350,000 acre-feet per year

from these sources; and one-half of all other flows occurring in the main channel of the Rio Grande.

"The effect of these allocations is to guarantee to the United States the use of about one-half of all the water of the river, and about 60 per cent of all such water which can be impounded in reservoirs on the main stream; this, despite the fact that most of the water of the Rio Grande below Fort Quitman comes from Mexican tributaries. Under future depletions upstream it is expected that the total average stream flow into the reservoirs will be about 3,400,000 acre-feet, of which approximately 2,000,000 acre-feet will belong to the United States.

"It is estimated that the conservation of water in the reservoirs to be constructed on the Rio Grande will make possible the irrigation of about 400,000 additional acres in the United States, or an estimated total, including lands now irrigated, of about 900,000 acres of land. (p. 1809) . . .

"General supervision of the administration of the treaty is delegated to the International Boundary Commission, created by the convention with Mexico, March 1, 1889, its name being changed by the pending treaty to the International Boundary and Water Commission. The pending treaty serves merely to extend the jurisdiction of this Commission to embrace general supervision over the carrying out of treaty functions. (p. 1809) . . .

"On the Rio Grande, as has been said, the only works which are specifically provided for are the international storage and flood-control dams, which must necessarily fall under the jurisdiction of the Commission. Diversion dams and other ancillary works, and works of flood control and river rectification are left for future determination. To the extent that they may be built in the future, the international works of this character would likewise be under the jurisdiction of the Commission. The only works, then, which apparently come under the jurisdiction of the American section alone, are the gauging stations near the mouths of the tributaries necessary to measure the United States contributions to the main stream. Many of these gauging stations are presently being operated and maintained by the American section. (P. 1814) . . .

"On the Rio Grande, for instance, the principal duties of the Commission will be to build, operate, and maintain the international works on the boundary portion of the river, and to keep account of the waters allocated to each country. The duty of the American section will be to measure inflows into the main stream from the American tributaries, so that the United States will receive credit therefor, and to measure certain diversions and uses which are chargeable against the United States allocations. *With respect to the use within the United* (P. 1814) *States of its share of the waters, neither the Commission nor the American section has any jurisdiction whatsoever.*" (P. 1815)

# APPENDIX "B"

TESTIMONY OF HON. GROVER SELLERS, ATTORNEY GENERAL OF TEXAS, FEBRUARY 14, 1945. [Hearings before the Committee on Foreign Relations, United States Senate, on Treaty with Mexico relating to the Utilization of the Waters of Certain Rivers, February 12, 13, 14 and 15, 1945, Part 4, p. 1247]

"In the final analysis the powers of the Commission and of the American section are narrowly circumscribed and are subject to the control of the two Governments.

"Under articles 5 and 9 of the treaty, the existing diversions and uses along the Rio Grande in both countries are fully protected. As to future diversions, the American section is limited to a determination that water within the share of the United States is available at the time and place of the proposed new diversion with which to supply it. It should be noted that this determination as to American diversions is to be made by the American section, not by the Commission. Since articles 8 and 9 require the Commission, and not the two sections, to keep accurate records of the quantities of waters in the reservoirs and flows in the main stream within the allocated share of each country, this determination by the American Commissioner is purely factual and ministerial. *No discretion is vested in him as to such determination. Where the water is to be used and at what times and in what quantities, as well as all titles to realty on the American side, are entirely matters for the determination of the duly constituted authorities of the State of Texas under the provisions of State law.* The effect of the treaty, however, will be to give added value to water rights along the Rio Grande in Texas, because it will afford an adequate supply of water upon which these rights can

operate. *There is nothing in the entire treaty even suggestive of any right or power in the Commission or either of its sections to pass upon the validity or respective priorities of private rights. Those matters will continue to be determined by the State law.*"

# APPENDIX "C"

HOUSE CONCURRENT RESOLUTION NO. 4 OF THE LEGISLATURE OF THE STATE OF TEXAS, ADOPTED JANUARY 10–11, 1945. [Hearings before the Committee on Foreign Relations, United States Senate, on Treaty with Mexico relating to the Utilization of the Waters of Certain Rivers, February 12, 13, 14 and 15, 1945, Part 4, p. 1243]

"Whereas general administration of the treaty is confided to the International Boundary Commission, United States and Mexico, an old and experienced agency with a long record of successful administration of water and other problems along the Mexican boundary; and

"Whereas the administrative provisions of the treaty are adequate for the efficient discharge of treaty functions, *but in no way encroach upon the rights of the States to handle and control their water problems, including the distribution and use of the waters allocated to the United States, nor do said administrative provisions infringe in any way upon the rights of municipalities, communities and individuals within the States,* nor do said administrative provisions conflict with the jurisdiction of other established agencies, Federal, State, or local: Therefore, be it

"Resolved by the House of Representatives of the State of Texas, the Senate concurring, That the Texas Legislature go on record endorsing the ratification of said treaty . . ."

# APPENDIX "D"

## *SPANISH LAW OF RIPARIAN WATERS*

From *Diccionario de legislación y jurisprudencia,* Dr. Joaquin Escriche (1842) Topic *Aguas.*

[Translation from Wiel on Water Rights in the Western States ( 3d Ed.) Part IV, Section 1026, pp. 961–962; Section 1027, p. 964]

"If running water passes between the properties of different owners, each one of the latter can use it for the irrigation of his property, or for any other object; not entirely, however, but only in the part that belongs to him, because all have equal rights, and consequently, they can prevent each other from taking more than their respective shares. When the water passes within a property, the owner can use it arbitrarily, for, since both banks are his, he has not to subject himself to the interests of an opposite riparian owner; but at the outlet of his estate, he must return it to its natural or ordinary channel, without having power to absorb it, or entirely consume it, nor give it another direction, because it does not belong to him as a property, but only to the extent of the use which he can make of it in its passage. Since, then every riparian proprietor can use the water which passes by the edge of his property to irrigate it, it is clear that he can open drains, irrigating canals and ditches, and even construct a dam or other structure to take and carry it to his property, provided he does not make it overflow the higher lands against the will of their owners or inundate the lower lands in a way that may cause injuries, nor hold it in such a way that the neighbors are deprived of their accustomed irrigation. None of the riparian proprietors can construct works on the property of another with-

out his consent, nor even raise on it a weir or dam to cause the waters to enter more abundantly on his property; since all have the same rights, the works ought not to be made, except in such a way that the water will be divided with equality. But this principle of equality in the division of the waters is subordinate to the interest of agriculture, which will regularly demand that the greater quantity be devoted to the estates of greatest extent, as the Roman law required. Nevertheless, as the largest estate does not always need the greatest amount of water, the maxim of the Romans ought not to be applied except under certain restrictions. As the higher proprietors cannot absolutely deprive the lower ones of the use of the water, but must restore it to its natural channel after having made use of it, except the inevitable loss caused by the irrigation; in the same manner, in an inverse sense, the owners of mills, water-wheels, fulling-mills, factories, and other industrial establishments, have no such right to all the water necessary for the movement of their machines that they can deprive totally of it the proprietors of the higher properties. Nevertheless, when it is a question of mills in a country where there are few, and, on account of a drought they need all the water, there ought to be suspended on their account, for the common good, the irrigation of the meadows and the other properties as long as the state of drought lasts.

"A riparian proprietor can transfer the right of taking the water by renunciation, cession, sale, or other means in favor of the proprietor on the other side, or of him lower down, and if, having two properties, he gets rid of one, he can reserve the exclusive right of using the water for that which he preserves, or conceding it for that which he transfers. The riparian proprietor cannot, without the consent of the other riparian owners interested, concede to a third party, to their injury, the power of taking water from the same stream or on to his estate, nor himself use the water to irrigate another property which belongs to him, but which is not situated on the bank, although this right can be acquired by prescription. When a property on a river bank is divided amongst several joint or common owners, in a manner that the portions which are assigned or sold to any of them, and

which now form other small properties not bounding on the stream, they preserve, nevertheless, one with another, their right to the water in the same proportion that they had before the division, even when nothing should have been stipulated on this subject. . . . The proprietor who augments the extension of his riparian property by the acquisition of lands contiguous, which increases it, cannot take *more* water than formerly for his irrigation, to the detriment of the other interested parties; since, if he had the power he could in time render illusory the rights of the other riparian proprietors."